TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 139.

WILMINGTON STAR MINING COMPANY, PLAINTIFF IN ERROR,

vs.

MINNIE FULTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 24, 1898.

(19,945.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 20, 1906.

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a In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Mr. Arthur J. Eddy, Mr. Patrick C. Haley, Mr. Emil C. Wetten, Messrs. Donahue & McNaughton, Attorneys for Minnie Fulton.
Mr. Charles S. Holt, Mr. Arthur Dana Wheeler, Mr. William P. Sidley, Attorneys for Wilmington Star Mining Company.

1 Pleas in the Circuit Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court room, in the City of Chicago, in said District and Division before the Honorable Solomon H. Bethea, District Judge of the United States for said Northern District of Illinois, on Tuesday, the first day of August, being one of the days of the regular July term of said Court, in the year of our Lord one thousand nine hundred and five, and of our Independence the one hundred and thirtieth year.

MARSHALL E. SAMPSELL, *Clerk.*

2 *Grundy County Court Record. Filed April 9, 1902.*

NORTHERN DISTRICT OF ILLINOIS, *Northern Division, ss:*

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Be it remembered that on this day to-wit: the ninth day of April, in the year of our Lord one thousand nine hundred and two came the defendant in the above entitled cause by its attorneys, Mess. Holt, Wheeler and Sidley and filed in the clerk's office of said court a certain transcript of record from the Circuit Court of Grundy County, Illinois, which said transcript of record (omitting therefrom the three last counts of plaintiff's original declaration) is in words and figures following to-wit:

Transcript of Record and Proceedings.

From Grundy County, Illinois.

Placita.

UNITED STATES OF AMERICA.
STATE OF ILLINOIS, *Grundy County, ss:*

In Circuit Court, September Term, A. D. 1901.

Pleas before the Honorable Charles Blanchard, one of the Judges of the Thirteenth Judicial Circuit of the State of Illinois, and one of the presiding Judges of the Circuit Court of Grundy County, in the State aforesaid, and at a term thereof begun and held at the Court House in the City of Morris, in said County, on the Third Monday (being the sixteenth day) of September, in the year of our Lord one thousand nine hundred and one and of the Independence of the said United States the one hundred and twenty-sixth.

Present: Honorable Charles Blanchard, Judge of the Thirteenth Judicial Circuit of the State of Illinois. Fred S. Johnson, Clerk, Charles F. Hanson, State's Attorney, Charles W. Johnson, Sheriff.
Attest:
FRED S. JOHNSON, *Clerk.*

3 Be it remembered that heretofore on to-wit: on the 10th day of September, A. D. 1901, there was filed in said Court a certain Praecipe for summons which is in words and figures as follows, to-wit:

Praecipe for Summons. Filed Sept. 10, 1901.

STATE OF ILLINOIS, *County of Grundy, ss:*

Circuit Court of Said Grundy County, March Term, A. D. 1902

MINNIE FULTON, Plaintiff,
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY, Defendant.

Case. Damages, $5,000.00.

The Clerk of said Court will issue a summons in the above entitled cause to said defendant in a plea of case to the damage of said plaintiff in the sum of five thousand dollars, direct the same to the sheriff of Grundy County to execute, and make it returnable to the March Term of said Court, A. D. 1902.

DONAHUE & McNAUGHTON,
Plaintiff's Attorneys.

To the Clerk of said Court, Joliet, Sept. 9th, 1901.

(Endorsed:) Filed this 10th day of September, A. D. 1901. Fred S. Johnson, Clerk.

Whereupon there was issued by the clerk of said Court a certain summons which is in words and figures as follows to-wit:

Summons. Issued Sept. 10, 1901.

STATE OF ILLINOIS, *Grundy County, ss:*

The People of the State of Illinois to the Sheriff of Grundy County, Greeting:

We command you, that you summon Wilmington Star Mining Company of Coal City, if it shall be found in your county, personally to be and appear before the Circuit Court of said Grundy County, on the first day of the next term thereof, to be holden at the Court House in Morris, in said Grundy County, on the first Monday of March, 1902 to answer unto Minnie Fulton, in a plea of case to the damage of the said plaintiff as she says in the sum of five thousand ($5000.00) dollars. And have you then and there this Writ, with an endorsement thereon, in what manner you shall have executed the same.

Witness, Fred S. Johnson, Clerk of said Court, and the seal thereof, at Morris aforesaid, this 10th day of September, A. D. 1901.

[Circuit Court, Grundy County, Ill.]

FRED S. JOHNSON, *Clerk.*

(Endorsed.)

Return to Summons. Filed Sept. 13, 1901

STATE OF ILLINOIS, *Grundy County, ss:*

I have duly served the within summons by reading the same to Wm. Campbell, superintendent of Wilmington Star Mining Company of Coal City, the president not found in my county, this 12th day of September A. D. 1901, as I am therein commanded.

CHAS. W. JOHNSON, *Sheriff,*
By J. H. FRANCIS, *Deputy.*

Filed in Circuit Court, this 13" day of Sept. A. D. 1901.

FRED S. JOHNSON, *Clerk.*

Be it remembered that heretofore on to-wit: the 10th day of September, A. D. 1901, there was filed in said Court a certain Affidavit, which is in words and figures as follows to-wit:

5 *Affidavit of Minnie Fulton. Filed Sept. 10, 1901.*

STATE OF ILLINOIS, *Grundy County, ss:*

In the Circuit Court of Said Grundy County, September Term, A. D. 1901.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

Case.

Minnie Fulton, being first duly sworn, on her oath says that she is the plaintiff in the above entitled cause; that she is a poor person and unable to pay the costs in the said suit; and that her cause of action is meritorious. She prays to be permitted to prosecute as a poor person, as by the statute in such case made and provided.

MRS. MINNIE FULTON.

Subscribed and sworn to before me this 7th day of September, A. D. 1901.

JOSEPH BROOKE,
Justice of the Peace.

(Endorsed:) Filed this 10th day of September, 1901. Fred S. Johnson, Clerk.

Be it remembered that heretofore, to-wit: on the 10th day of September, A. D. 1901, there was filed in said Court a certain Declaration which is in words and figures as follows to-wit:

Declaration. Filed Sept. 10, 1901.

STATE OF ILLINOIS, *Grundy County, ss:*

In the Circuit Court of Said Grundy County, to the September Term, A. D. 1901.

Minnie Fulton, plaintiff in this suit by Donahoe & McNaughton her attorneys, complains of the Wilmington Star Mining Company of Coal City, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, defendant of a plea of trespass on the case:

6 For that whereas heretofore, to-wit, on the 27th day of January A. D. 1901 and for a long time prior thereto in the County of Grundy aforesaid the said defendant was possessed of and was operating a coal mine, and so being possessed of and operating said coal mine on the date aforesaid in the County aforesaid, the said defendant had in its employ as coal miners a large number of men,

amongst whom was one Samuel Fulton, husband of said plaintiff, who was then and there employed by defendant as a trackman and mine laborer; that said Samuel Fulton was then and there engaged in working in said coal mine.

That it then and there became and it was the duty of the said defendant in the use, management and operation of said coal mine, to maintain therein currents of fresh air, sufficient for the health and safety of all men and animals employed therein, as by the statute in such case made and provided; yet the said defendant wholly regardless of its duty in that behalf, wilfully failed to maintain in said coal mine currents of fresh air sufficient for the health and safety of said Samuel Fulton, contrary to the form of the statute in such case made and provided; by means and in consequence of which wilful failure on the part of the said defendant to so maintain in said coal mine such currents of fresh air as aforesaid, a large quantity of dangerous gas was suffered and permitted, by the said defendant, to accumulate, be and remain through and in the place in said coal mine where the said Samuel Fulton was then engaged at work in the line of his employment.

And the plaintiff avers that while the said Samuel Fulton was then and there engaged in the prosecution of his work, as aforesaid, in said coal mine, said dangerous gas, so permitted to accumulate therein, as aforesaid, became ignited and then and there exploded, and the said Samuel Fulton then and there and thereby suffered and sustained such injuries as then and there caused his death. And whereas also the said defendant on to-wit, the 27th day of January, A. D. 1901, and for a long time prior thereto, was possessed of and was using and operating a certain other coal mine in to-wit: the County of Grundy aforesaid, and so being possessed of and using and operating said coal mine, the said defendant, had to-wit, on the day and year aforesaid, to-wit: in the County of Grundy aforesaid, employed one Samuel Fulton, then husband of said plaintiff, as trackman and mine laborer, as aforesaid, together with a large number of others, as coal miners, to serve the said defendant in working and operating said coal mine; that it thereupon became and it was the duty of the said defendant in the use, management and operation of said coal mine, to see that in
7 said coal mine, cross-cuts were made at proper distances apart, to secure the best ventilation at the face of all working places, as by the statute in such cases made and provided; yet the said defendant wholly regardless of its duty in that behalf, and in willful violation thereof, wilfully failed, refused and neglected to make and provide in such coal mine, a sufficient number of cross-cuts, for ventilation purposes, contrary to the statute in such cases made and provided; by means whereof and in consequence of which wilful failure on the part of said defendant as aforesaid, dangerous gases were suffered and permitted to accumulate be and remain, at and near the face of the working place, in said coal mine where the said Samuel Fulton was then and there employed at work, as aforesaid.

And the plaintiff avers, that while the said Samuel Fulton was then and there employed at work, as aforesaid, said dangerous gases,

so permitted to be and accumulate in said coal mine, as aforesaid, at the place aforesaid, became ignited thereby then and there causing an explosion, and said Samuel Fulton by reason of the premises, then and there suffered and sustained such severe injuries as then and there caused his death.

And whereas also, the said defendant, heretofore to-wit, on the 27th day of January, A. D. 1901, and for a long time prior thereto was possessed of and was using and operating a certain coal mine, situated in the county of Grundy aforesaid, and being so possessed of and operating said coal mine the said defendant had in its employ, as a trackman and mine laborer, the said Samuel Fulton, then husband of said plaintiff, who was then and there with other employees of the said defendant, engaged in the work of trackman and mine laborer, and performing such labor as is incident to said work: that it thereupon became and it was the duty of the said defendant, in the use, management and operation of said coal mine, to see that all stoppings along air-ways in said coal mine, were properly and promptly built, as provided by the statutes of the State of Illinois: yet the said defendant, wholly regardless of its duty in that behalf, willfully failed and neglected to build necessary stoppings, in a substantial manner to close cross-cuts connecting the inlet and outlet air-courses in said coal mine, said coal mine being then and there, a coal mine, in which dangerous gases were generated, contrary to the form of the statute in such case made and provided: by means and in consequence of such wilful failure and neglect on the part of said defendant, as aforesaid, a large quantity of dangerous gas was suffered and permitted to accumulate be and remain at the place in said coal mine where said Samuel Fulton was then and there at the special instance and request of the said defendant required to work.

8 And plaintiff avers that while said Samuel Fulton was so engaged in said coal mine, as aforesaid, said dangerous gas then and there became ignited and exploded, then and there and thereby inflicting upon the said Samuel Fulton such severe wounds as immediately caused his death.

* * * * * * *

(The three last counts of plaintiff's declaration are here omitted, for the reasons that demurrers to the said three counts were sustained by the Court.)

And plaintiff avers that the said Samuel Fulton left him surviving, said plaintiff Minnie Fulton, his widow, Annie Fulton, Mary Fulton, Alexander Fulton, William Fulton and Maggie Fulton, his minor children and only lineal heirs at law, to whom a cause of action has accrued for the recovery of damages due to the loss of the life of the said Samuel Fulton.

Wherefore, the said plaintiff says that she has sustained damage to the amount of five thousand dollars and therefore she brings this suit, etc.

DONAHOE & McNAUGHTON,
Plaintiff's Attorneys.

(Endorsed) Filed *Nunc Pro Tunc* as of 10" day of Sept., 1902. Fred S. Johnson, Clerk.

Be it remembered that afterwards on to-wit: the 13th day of January, A. D. 1902, there was issued out of said Court a certain alias summons which is in words and figures as follows, to-wit:

Alias Summons. Issued Jan. 13, 1902.

STATE OF ILLINOIS, *Grundy County, ss:*

The People of the State of Illinois, to the Sheriff of Grundy County, Greeting:

We command you, that you summon Wilmington Star Mining Company if it shall be found in your county, personally to be and appear before the Circuit Court of said Grundy County, on the first day of the next term thereof, to be holden at the Court House in Morris, in said Grundy County, on the first Monday of March, 1902, to answer unto Minnie Fulton in a plea of case to the damage of the said plaintiff as she says in the sum of five thousand ($5000.00) dollars. And have you then and there this Writ, with an endorsement thereon, in what manner you shall have executed the same.

[Circuit Court, Grundy County, Ill.]

Witness Fred S. Johnson, Clerk of our said Court, and the seal thereof, at Morris aforesaid, this 1st day of November, A. D. 1901.

FRED S. JOHNSON, *Clerk.*

(Endorsed)

9 *Return to Summons. Filed Jan.* 13, 1902.

STATE OF ILLINOIS, *Grundy County, ss:*

I have duly served the within summons by reading the same to and by leaving a true copy thereof with William Campbell, Superintendent and agent of the within named Wilmington Star Mining Company (the president of said Wilmington Star Mining Company not found in my County) this 17 day of December A. D. 1901, as I am therein commanded.

CHAS. W. JOHNSON, *Sheriff.*

Filed in Circut Court, this 13th day of January A. D. 1902.

FRED S. JOHNSON, *Clerk.*

Be it remembered that afterward on to-wit: the 8th day of October, 1901, there was filed in said Court a certain Amendment which is in words and figures as follows to-wit:

Amendment to Declaration. Filed Oct. 8, 1901.

STATE OF ILLINOIS, *Grundy County, ss:*

Circuit Court Thereof, March Term, A. D. 1902.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Trespass on the Case.

Now comes the plaintiff in this suit, by Donahoe & McNaughton and E. L. Clover, her attorneys, and by leave of court first had and obtained for that purpose, amends her declaration filed herein in the manner following, that is to say:

By striking out the words "of Coal City" immediately following the word "Company" in the fourth line from the top of the first page of said declaration, and by striking out the word "Illinois" in the sixth line from the top of said page and substituting the word "Wisconsin" therefor.

DONAHOE & McNAUGHTON &
E. L. CLOVER, *Att'ys for Plaintiff.*

(Endorsed:) Filed *Nunc pro tunc* as of 8th day of Oct. 1901, Fred S. Johnson, Clerk.

10 Be it remembered that afterwards to-wit: on the 8th day of October A. D. 1901, the same being one of the regular days of the September Term of the Circuit Court of said County the following among other proceedings were had, made and entered of record in words and figures following, to-wit:

Order of Oct. 8, 1901, Granting Leave to Amend.

2281.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

Case.

Now comes the plaintiff by her attorney and on his motion it is ordered by the Court that leave be and is hereby granted to the plaintiff to amend the Praecipe, Summons and Declaration on file in this cause by striking out the words "of Coal City" in the name of the defendant.

And it is further ordered by the Court on motion of the plaintiff by her attorney that a new summons be issued by the clerk of this Court against the defendant in this cause.

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Grundy County*, ss:

In the Circuit Court, March Term, A. D. 1902.

Pleas before the Honorable Samuel C. Stough, one of the Judges of the Thirteenth Judicial Circuit of the State of Illinois, and one of the presiding Judges of the Circuit Court of Grundy County, in the State aforesaid, and at a term thereof begun and held at the Court House, in the City of Morris, in said County, on the first Monday (being the Third day) of March in the year of our Lord one thousand nine hundred and two, and of the independence of the said United States, the one hundred and twenty-sixth.

1 Present: Honorable Samuel C. Stough, Judge of the Thirteenth Judicial Circuit of the State of Illinois. Fred S. Johnson, Clerk. Charles F. Hanson, State's Attorney. Charles W. Johnson, Sheriff.

Attest:

FRED S. JOHNSON, *Clerk*.

Be it remembered that afterwards on to-wit: the 4th day of March A. D. 1902, there was filed in said Court a certain petition which is in words and figures as follows, to-wit:

Petition for Removal. Filed March 4, 1902.

STATE OF ILLINOIS, *Grundy County*, ss:

In the Circuit Court of Grundy County.

MINNIE FULTON, Plaintiff,

vs.

THE WILMINGTON STAR MINING COMPANY, Defendant.

Petition to Remove this Case to the United States Circuit Court.

To the Honorable the Circuit Court of Grundy County, State of Illinois:

Your petitioner the Wilmington Star Mining Company respectfully shows that it is the defendant in the above entitled suit, that the matter in dispute therein exceeds, exclusive of interest and costs the sum of two thousand ($2000.00) dollars.

Your petitioner further shows that said suit is of a civil nature and is an action of trespass on the case to recover damages in the sum of $5000.00 dollars from your petitioner, growing out of certain injuries to the plaintiff Minnie Fulton which are alleged to have been caused by the wrongful act, neglect or default of your petitioner.

12 Your petitioner further shows that in the said above mentioned suit there is a controversy which is wholly between citizens of different states and which can be fully determined as between them, to-wit: a controversy between your said petitioner, which avers that it was at the commencement of this suit and still is a citizen and a resident of the State of Wisconsin and the said plaintiff, Minnie Fulton, who your petitioner avers was at the commencement of this suit and still is a citizen and a resident of the State of Illinois and that both the said Minnie Fulton and your petitioner are actually interested in said controversy, that your petitioner was not at the time of the commencement of this action, nor is it now a citizen or a resident of the State of Illinois, but that at the time of the commencement of this action, it was and has been ever since and now is a corporation duly organized and existing under the laws of the state of Wisconsin, and has and has had at all of said times its principal office and place of business in the City of Summit in the State of Wisconsin and that your petitioner is a citizen and a resident of the state of Wisconsin.

And your petitioner offers herewith, a bond, with good and sufficient surety in the penal sum of five hundred ($500.00) dollars conditioned for its entering in the Circuit Court of the United States for the Northern District of Illinois, Northern Division on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no farther herein except to make an order of removal as required by law, and to accept the said surety and bond and to cause the record herein to be removed into said Circuit Court of United States within and for the Northern District of Illinois, Northern Division, according to the statute in such case made and provided.

And your petitioner will ever pray, etc.

WILMINGTON STAR MINING COMPANY,
By MILFORD D. BUCHANAN, *President.*

A. R. JORDAN,
J. W. RAUSCH, *Attys.*

13 STATE OF ILLINOIS, *Grundy County ss:*

Milford D. Buchanan being duly sworn on oath deposes and says that he is the president of the Wilmington Star Mining Company, the petitioner in the above entitled cause and that as such president he has authority to make the foregoing application for removal; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true as he verily believes.

MILFORD D. BUCHANAN.

Subscribed and sworn to by the said Milton D. Buchanan this 4th day of March, A. D. 1902, before me.

J. W. RAUSCH.

[J. W. Rausch, Notary Public, Grundy Co. Ills.]

(Endorsed) Filed this 4 day of Mar. 1902, Fred S. Johnson, Clerk.

Be it remembered that afterwards on, to-wit: the 4th day of March A. D. 1902, there was filed in said Court a certain Bond which is in words and figures as follows, to-wit:

Bond on Removal. Filed March 4, 1902.

Bond.

Know all men by these presents, that we, the Wilmington Star Mining Company as principal, and Jacob W. Rausch of Morris, in the County of Grundy and State of Illinois, as surety, are held and firmly bound unto Minnie Fulton and all other persons whom it may concern in the penal sum of five hundred ($500.00) dollars lawful money of the United States for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally and firmly by these presents.

Whereas, the Wilmington Star Mining Company, principal above named has petitioned the Circuit Court of Grundy County in the State of Illinois, for the removal of a certain suit therein pending wherein Minnie Fulton is plaintiff and the Wilmington Star Mining Company is defendant unto the Circuit Court of the United States in the Northern District of Illinois, Northern Division.

14 Now, therefore, the condition of this obligation is such, that if the above bounden Wilmington Star Mining Company shall enter in such Circuit Court of the United States on the first day of its next session, a copy of the record in such suit and shall pay all costs that may be awarded by said Circuit Court, if said Circuit Court shall hold that such suit was improperly or wrongfully removed thereto and shall also appear in said Circuit Court and enter special bail in such case, if special bail is required therein and shall do such other appropriate acts, as by the acts of Congress in that behalf requires to be done upon the removal of such suit from said State Court into the United States Court, then this obligation to be void, otherwise enforced.

Witness our hands and seals, this 4th day of March, 1902.

WILMINGTON STAR MINING COMPANY,
By MILFORD D. BUCHANAN, *Pres't.* [SEAL.]
JACOB W. RAUSCH. [SEAL.]

Attest:
D. W. BUCHANAN, *Secretary.*

Wilmington Star Mining Company Incorporated 1892.

STATE OF ILLINOIS, *Grundy County, ss:*

Jacob W. Rausch, being duly sworn says, that he is a resident and householder in the County of Grundy and worth the sum of one thousand ($1000.00) dollars, over and above all debts and liabilities,

which he owes or has incurred and exclusive of property exempt from levy and sale under execution.

JACOB W. RAUSCH.

Sworn to before me, this 4th day of March, 1902.

O. S. HAGEN,
Notary Public.

[O. S. Hagen, Notary Public, Grundy Co., Ills.]

15 UNITED STATES OF AMERICA, *Northern District of Illinois, County of Grundy, ss:*

I hereby certify that on this 4th day of March 1902, before me, personally came and appeared Milford D. Buchanan, President of the principal in the within bond, personally known to me and known to be the president as aforesaid and the person who executed the foregoing bond as president of and for said principal and that he thereupon acknowledged that he executed the same in the manner and form and for the purpose therein mentioned as a free act and deed of said principal

JACOB W. RAUSCH,
Notary Public.

[J. W. Rausch, Notary Public, Grundy Co., Ills.]

STATE OF ILLINOIS, *Grundy County, ss:*

I hereby certify that on this 4th day of March, 1902, before me personally came and appeared Jacob W. Rausch to me well known and known to me to be the person in, and who executed the foregoing bond as surety and thereupon acknowledged to me that he executed the same in the manner and form and for the purpose therein mentioned.

O. S. HAGEN,
Notary Public.

[O. S. Hagen, Notary Public, Grundy Co., Ills.]

Bond approved by me this 4" day of M'eh, 1902.

S. C. STOUGH, *Judge.*

(Endorsed:) Filed this 4 day of Mar. 1902, Fred S. Johnson, Clerk.

16 Be it remembered that afterwards to-wit: on the 4th day of March, A. D. 1902, it being one of the regular days of the said March term A. D. 1902, the following among other proceedings were had, made and entered of record, in words and figures, as follows, to-wit:

Order of March 4, 1902, Allowing Removal, etc.

2281.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

Case.

Now on this day comes the plaintiff by her attorneys, Donahoe & McNaughton and E. L. Clover and the defendant by its attorney, A. R. Jordan, also comes.

Now on this day comes the plaintiff by her solicitors, and enters a motion for leave to file copy of lost declaration in this cause *nunc pro tunc* as of the 10th day of September A. D. 1901, and the Court being now fully advised in the premises, upon consideration thereof doth order that said motion be and the same is hereby granted. It is therefore ordered that leave be and is hereby granted to file copy of lost declaration in this cause *nunc pro tunc* as of the 10th day of September, A. D. 1901.

Now again comes the plaintiff and on her motion it is ordered by the Court that leave be and is hereby granted to file amendment to declaration in this cause *nunc pro tunc* as of the 8th day of October, A. D. 1901.

And now comes the defendant the Wilmington Star Mining Company by its attorney A. R. Jordan, and the plaintiff by her attorneys, Donahoe & McNaughton and E. L. Clover, also comes.

And now comes the defendant by its attorney A. R. Jordan, and presents a bond in the penal sum of five hundred dollars together with a petition for the removal of this cause from this court to the Circuit Court of the United States, for the Northern Division — District of Illinois, by which it appears that the matter in dispute in this suit exceeds the sum of two thousand dollars, that there is a controversy between citizens of different states, that at the time of the commencement of this suit, the said defendant was and still is a citizen of the state of Wisconsin, and that the said plaintiff, Minnie Fulton, was and still is a citizen of the State of Illinois.

And now the court having examined the bond and the petition of said defendant to remove this cause to the Circuit Court of the United States for the Northern District of Illinois, Northern
17 Division and being now fully advised in the premises, upon consideration thereof, doth order that the bond be and the same is hereby approved.

It is further ordered by the Court that the prayer of the petition be and the same is hereby granted.

Certificate of Clerk.

STATE OF ILLINOIS, *Grundy County, ss:*

I, Fred S. Johnson, clerk of the Circuit Court of Grundy County, in the State aforesaid, and keeper of the records and files of said Court, do hereby certify the above and foregoing to be a true, perfect and complete copy of the files and all orders made by the court in a certain cause lately pending in said Court on the law side thereof wherein Minnie Fulton was plaintiff and The Wilmington Star Mining Company was defendant as the same appears from the records and files of said Court now in my office remaining.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Morris, Illinois this twentieth day of March, A. D. 1902.

[SEAL.] FRED S. JOHNSON, *Clerk.*

(Endorsed:) Filed Apr. 9, 1902, Marshall E. Sampsell, Clerk.

Entry of Filing of Demurrer, May 6, 1902.

And on to-wit: the sixth day of May, 1902, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said Court its certain demurrer to the declaration which demurrer was sustained by the court and not copied here.

And on to-wit: the 6th day of October, in the July term of said Court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

18 *Order of Oct. 6, 1902, Granting Leave to Amend Declaration.*

Order of October 6, 1902.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

Case.

Now come the parties by their attorneys, and by agreement of counsel, plaintiff has leave to amend the declaration hereby by changing the name of plaintiff and to file additional counts instanter. The demurrer on file to the original declaration to stand to said additional counts.

Entry of Filing Additional Counts, Oct. 8, 1902.

And on to-wit: the 8th day of October, 1902, came the plaintiff in said entitled cause by her attorneys and filed in the clerk's office of said court her certain additional counts to which demurrer was sustained by the court and said additional count not copied here.)

Entry of Filing Demurrer to Additional Counts, Oct. 20, 1902.

(And on to-wit: the 20th day of October, 1902, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain demurrer to additional counts heretofore filed herein, said demurrer was sustained by the court and not copied here.)

And on to-wit: the 24th day of October, being one of the days of the regular July Term of said Court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

Order of Oct. 24, 1902, Sustaining Demurrers.

Order of October 24, 1902.

Demurrer to 2nd, 3rd and 4th Additional Counts sustained.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO. OF COAL CITY.

Now come the parties by their attorneys and the general and special demurrer to the first additional count is heard and sustained, with leave to the plaintiff to amend in five days. The demur-
19 rer to the second and third additional counts is also heard and sustained and the demurrer to the fourth additional count is also heard and sustained, and the general and special demurrers to the original declaration herein *is* withdrawn.

And on to-wit the 28th day of October, 1902, came the plaintiff in said entitled cause by her attorney and filed in the clerk's office of said Court her certain Additional Count in words and figures following to-wit:

Additional Count to Declaration. Filed Oct. 28, 1902.

Additional Count.

In the Circuit Court of the United States within and for the Northern District of Illinois, Northern Division, October Term, A. D. 1902.

MINNIE FULTON, Plaintiff,
vs.
WILMINGTON STAR MINING COMPANY.

Case.

Additional Count to Plaintiff's Declaration, Leave to File the Same Having Been First Had and Obtained.

And whereas also heretofore, to-wit, on the 27th day of January, A. D. 1901, and for a long time prior thereto, in the County of Grundy and State of Illinois, the said defendant was possessed of and was operating a certain coal mine, and being so possessed of and operating said coal mine the said defendant had in its employ a large number of men amongst whom was one Samuel Fulton, husband of the said plaintiff, who were then and there engaged in working in and about said coal mine in behalf of said defendant.

That it then and there became and it was the duty of the said defendant, in the use, management and operation of said coal mine, to inspect all places therein where men were expected to pass or to work, and observe whether there were then and there accumulations of gas therein before said Samuel Fulton and other employees of the said defendant were permitted to enter into said mine; yet the said defendant, wholly regardless of its duty in that behalf, wilfully failed and neglected to have the place in said coal
20 mine where said Samuel Fulton was then and there expected to pass and to work inspected before said Samuel Fulton was permitted to enter into said coal mine, contrary to the form of the statute in such case made and provided; by means whereof and in consequence of which wilful failure to inspect said coal mine by said defendant, as aforesaid, a large quantity of dangerous gas was suffered and permitted to accumulate, be and remain in said coal mine at the place therein where said Samuel Fulton was expected to pass and to work.

And the plaintiff avers that on the date aforesaid said Samuel Fulton was permitted to enter into said coal mine and to work therein before the said defendant had inspected the places therein where the said Samuel Fulton was expected to pass and to work, and before said accumulations of dangerous gas then in said coal mine had been removed therefrom; and while he, the said Samuel Fulton, was engaged at work in said coal mine, said dangerous gas so wilfully permitted to accumulate, be and remain therein, as aforesaid, ignited and then and there caused an explosion whereby the

said Samuel Fulton suffered and sustained such injuries as then and there caused his death.

And plaintiff avers that the said Samuel Fulton left him surviving said plaintiff, Minnie Fulton, his widow, Annie Fulton, Mary Fulton, Alexander Fulton, William Fulton and Maggie Fulton, his minor children and only lineal heirs at law, to whom a cause of action has accrued for the recovery of damages due to the loss of life of the said Samuel Fulton.

Wherefore the said plaintiff says that she has sustained damage to the amount of Five Thousand Dollars and therefore she brings this suit.

MINNIE FULTON,
By DONAHOE & McNAUGHTON,
Her Attys.

(Endorsed:) Filed Oct. 28, 1902. Marshall E. Sampsell, Clerk.

And on to-wit: the 30th day of October, 1902, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain Plea to the first, second and third original counts in words and figures following to-wit:

21 *Plea. Filed Oct. 30, 1902.*

Plea.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

And the defendant, by Holt, Wheeler & Sidley, its attorneys comes and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances in said first, second and third original counts above alleged against it, and of this it puts itself upon the country, etc.

HOLT, WHEELER & SIDLEY,
Attorneys for Defendant.

(Endorsed:) Filed Oct., 30, 1902. Marshall E. Sampsell, Clerk.

Entry of Filing of Demurrer, Oct. 30, 1902.

(And on to-wit: the 30th day of October, 1902, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain demurrer to the 4th, 5th and 6th original counts the amended 1st additional count and the amended fourth additional Count, which said demurrer was sustained and not copied here.)

And on to-wit: the 30th day of October, in the July term of said Court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

22 *Order of Oct. 30, 1902, Postponing Hearing.*

Order of October 30, 1902.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

The motion of the plaintiff for leave to file additional counts herein is postponed to the 31st inst.

And on to-wit: the 5th day of November, in the July term of said Court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

Order of Nov. 5, 1902, Sustaining and Overruling Demurrers.

Order of November 5, 1902.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

Now again come the parties by their attorneys, and the plaintiff has leave to file an amended fourth additional count to the declaration herein *nunc pro tunc* as of October 28th., 1902, and the defendant has leave *nunc pro tunc* as of October 28th, 1902, to re-file demurrers to the fourth, fifth and sixth original counts of said declaration; and now comes on to be heard the demurrer to the declaration herein and to the various counts thereof; and the court having heard the arguments of counsel, and being now fully advised in the premises, It is Ordered that the demurrer to the fourth original count be sustained; the demurrer to the fifth original count be sustained, with leave to the plaintiff to amend within five days; the demurrer to the sixth original count be sustained; the demurrer to the amended first additional count be sustained, with leave to the plaintiff to amend within five days; and the demurrer to the amended fourth additional count be overruled.

And on to-wit: the 14th day of November, in the July term of said Court, 1902, in the records of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

23 *Order of Nov. 14, 1902, Granting Leave to File.*

Order of November 14, 1902.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

Now come the parties by their attorneys and on motion of the plaintiff's attorney leave is given to file instanter an amended first additional count and also the fifth, sixth and seventh additional counts, and the defendant is ruled to plead to said amended first additional count and to the fifth, sixth and seventh additional counts within ten days.

And on to-wit: the 14th day of November, 1902, came the plaintiff, in said entitled cause by her attorneys and filed in the clerk's office of said court certain additional counts. Demurrer was sustained to the amended first, additional and fifth and sixth additional counts which are not copied here. The seventh additional count is in the words and figures following to-wit:

Additional Counts. Filed Nov. 14, 1902.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division, October Term, A. D. 1902.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

Case.

(First appears an amended first additional count to plaintiff's declaration, and a fifth and sixth additional counts, to which said counts, defendant demurred, and the said demurrers were sustained by the Court.)

And whereas also as heretofore, towit, on the 27th day of January, 1901, and for a long time prior thereto, towit, in the County of Grundy and State of Illinois, said defendant was possessed of and was using and operating a coal mine, and being so possessed of said coal mine and being so engaged in the operation thereof, the said defendant had in its employ a large number of men, amongst whom

was one Samuel Fulton, husband of the said plaintiff, who was
24 then and there engaged by the said defendant as a trackman or mine laborer in and about said coal mine.

That it thereupon became and it was the duty of the said defendant to refuse to allow said Samuel Fulton to enter said coal mine to work therein until all conditions in said coal mine should have been made safe, except under the direction of said defendant's mine manager.

And plaintiff avers that there was then and there in said coal mine a large quantity of dangerous gas which had been suffered and permitted by the said defendant to be, accumulate and remain therein, and that the existence of said gas so in said mine constituted an unsafe condition therein, all of which the said defendant then and there well knew; yet the said defendant, wholly regardless of its duty in that behalf, wilfully failed and neglected to prevent the said Samuel Fulton from entering said coal mine to work therein before said dangerous gas had been removed therefrom and the conditions in said mine rendered safe, but on the contrary the said defendant suffered and permitted the said plaintiff to enter said coal mine to work therein before said dangerous gas had been removed therefrom and the conditions in said mine rendered safe, he, the said Samuel Fulton, not being then and there under the direction of said defendant's mine manager, contrary to the statute in such case made and provided, by means whereof and in consequence of which wilful failure on the part of the defendant, as aforesaid, said dangerous gas so permitted to be, accumulate and remain in said coal mine became ignited and then and there caused an explosion, and the said Samuel Fulton then and there and thereby suffered and sustained such injuries as then and there caused his death.

And plaintiff avers that the said Samuel Fulton left him surviving said plaintiff Mary Fulton his widow, Annie Fulton, Mary Fulton, Alexander Fulton, William Fulton, and Maggie Fulton, his minor children, and only lineal heirs at law, to whom a cause of action has accrued for the recovery of damages due to the loss of life of the said Samuel Fulton.

Wherefore the said plaintiff says that she sustained direct damages to the amount of Five Thousand dollars, and therefore she brings this suit, etc.

MINNIE FULTON,
By DONAHUE & McNAUGHTON,
Her Att'ys.

(Endorsed:) Filed Nov., 14, 1902. Marshall E. Sampsell, Clerk.

25 And on to-wit: the 22nd day of November, in the July term of said Court, 1902, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

Order of Nov. 22, 1902, Extending Time to Plead.

Order of November 22, 1902.

Time to Plead Additional Count Extended Five Days.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

By agreement of counsel, the time for defendant to plead to the additional counts herein is extended five days.

(And on to-wit: the 29th day of November, 1902, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said Court its certain demurrer to the amended first additional count and to the fifth, sixth and seventh additional counts, which said demurrer was sustained by the Court as to the amended first additional count and the fifth and sixth additional counts and was withdrawn as to the seventh additional count. Said demurrer not copied here.)

And on to-wit: the 30th day of December, being one of the days of the regular December term of said Court, 1902, in the record and proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, District Judge, appears the following entry to-wit:

Order of Dec. 30, 1902, Sustaining Demurrers, etc.

Order of December 30, 1902.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Now again comes the parties by their attorneys, and thereupon comes on to be heard the demurrer to the amended first additional count and to the fifth, sixth and seventh additional counts, all of which counts were filed herein on November 14th, 1902, and the Court having heard the arguments of counsel, and being now fully advised in the premises, It is Ordered that the demurrer be
26 sustained to the amended first additional count and to the fifth and sixth additional counts, and that the defendant have leave to withdraw its demurrer to the seventh additional count, which is accordingly done. It is further Ordered that leave be given to the plaintiff to file amended first, fifth and sixth additional counts within ten days, and that defendant plead to said amended and said seventh additional counts within five days thereafter.

And on to-wit: the seventh day of January, 1903, came the plaintiff in said entitled cause by her attorneys and by leave of Court first had and obtained filed in the clerk's office of said Court her certain 2nd amended 1st and her 5th and 6th additional counts in words and figures following to-wit:

Second Amended 1st Additional Count and the Amended Fifth and Sixth Additional Counts.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division, January Term, A. D. 1903.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Case.

The second amended first additional count, and the amended fifth and sixth additional counts to plaintiff's declaration herein, leave to file the same having been first had and obtained:

Minnie Fulton, plaintiff in this suit, in these the second amended first additional count, and the amended fifth and sixth additional counts to her declaration herein, by Donahoe & McNaughton, her attorneys, further complains of the Wilmington Star Mining Company, defendant of a plea of trespass in the case.

For that whereas, heretofore, to-wit, on the 27th day of January, A. D. 1901 and for long time prior thereto in the County of Grundy, State of Illinois, said defendant was possessed of and using and operating a coal mine and being so possessed of said coal mine
27 and being so engaged in the operation thereof, the said defendant had in its employ, a large number of men, among whom was one Samuel Fulton, husband of the said plaintiff, who was then and there engaged by the said defendant, as a track-man or mine-laborer in said coal mine.

That it then and there became and it was the duty of the said defendant in the use, management and operation of said coal mine to keep careful watch over all the ventilating apparatus and air currents in said coal mine and in case of accident to fan or machinery, by which said currents were obstructed or stopped to at once, order the withdrawal of the men, then in said coal mine and prohibit their return thereto until thorough ventilation had been by the said defendant re-established.

And the plaintiff avers that a part of the machinery used in said coal mine for creating air currents therein then and there accidentally became broken or lost, to-wit, the attachment to a certain valve on a certain steam-pipe then and there used for the conduct of steam, generated for the purpose of running a fan then and there used by the said defendant for ventilating purposes, whereby the air currents in said coal mine then and there became obstructed and stopped all of which was then and there well known to the said de-

fendant. Plaintiff avers that in consequence of said obstruction and stoppage of the air currents a large quantity of dangerous gas was thereby then and there suffered and permitted to accumulate, be and remain in said coal mine, at the place therein where said Samuel Fulton, was required to pass to work in the performance of his duty as such track-man or mine-laborer.

Plaintiff further avers that the said defendant, well knowing the premises in total disregard of its duty to the said Samuel Fulton, as aforesaid, then and there wilfully failed and neglected to order the withdrawal of said Samuel Fulton or other persons then in said coal mine, and prohibit his or their return thereto, until thorough ventilation had been re-established, contrary to the statute in such case made and provided; by means and in consequence of which wilful failure on the part of the said defendant said Samuel Fulton, was then and there suffered and permitted to continue and remain in said coal mine in the prosecution of his work, as aforesaid. And while said Samuel Fulton was so engaged in the prosecution of his work, in said coal mine said dangerous gas so then and there permitted to accumulate, be and remain in said coal mine became ignited and then and there exploded and the said Samuel Fulton, then and there and thereby suffered and sustained such injuries as then and there caused his death.

28 And plaintiff avers that the said Samuel Fulton, left him surviving, said plaintiff Minnie Fulton, his widow, Annie Fulton, Mary Fulton, Alexander Fulton, William Fulton and Maggie Fulton, his minor children, and only lineal heirs at law to whom a cause of action has accrued, for the recovery of damages due to the loss of the life of the said Samuel Fulton.

Wherefore the said plaintiff says that she has sustained direct damages to the amount of Five Thousand Dollars, and therefore she brings this suit, etc.

And whereas also, heretofore, to-wit, on the 27th day of January, A. D. 1901, and for a long time prior thereto, to-wit, in the County of Grundy, State of Illinois, said defendant was possessed of and using and operating a coal mine, and being so possessed of said coal mine, being so engaged in the operation thereof, said defendant had in its employ a large number of men, among whom was one Samuel Fulton, then husband of the said plaintiff, who was then and there engaged by the said defendant as a track-man, or mine-laborer in said coal mine.

That it then and there became and it was the duty of the said defendant in the use, management and operation of said coal mine, to then and there cause its mine-examiner to visit said mine before said Samuel Fulton and the other employees of the said defendant were permitted to enter the same, and see that the air current in said mine was travelling in proper course and in proper quantity; yet the said defendant wholly regardless of its duty in that behalf, wilfully failed and neglected to then and there cause its mine-examiner to visit said coal mine before said Samuel Fulton and other employees of the said defendant, aforesaid, were permitted to enter said coal mine, and wilfully failed and neglected to see that the air current in said coal mine was then and there travelling in its proper course, and

in proper quantity, contrary to the statute in such case made and provided: by means whereof, and in consequence of which wilful failure and neglect a large quantity of dangerous gas which had before that time accumulated in said mine at the place therein where said Samuel Fulton, was then and there required to pass in the performance of his duty as such track-man or mine-laborer, was suffered and permitted to be and remain therein unbroken and undisturbed.

Plaintiff further avers that the said Samuel Fulton, was then and there permitted to enter said coal mine before said defendant's mine-examiner had visited said coal mine and had seen that the air current in said coal mine was travelling in proper course and in proper quantity and before said accumulation of said dangerous gas
29 then in said coal mine had been broken up or removed therefrom: and while said Samuel Fulton was then and there engaged in the performance of his duty, in said coal mine as aforesaid, said dangerous gas so permitted to accumulate, be and remain therein as aforesaid, became ignited and then and there caused an explosion whereby the said Samuel Fulton then and there and thereby suffered and sustained such injuries as caused his immediate death.

And plaintiff avers that the said Samuel Fulton left him surviving said plaintiff, Minnie Fulton, his widow, Annie Fulton, Mary Fulton, Alexander Fulton, William Fulton and Maggie Fulton, his minor children and only lineal heirs at law, to whom a cause of action has accrued for the recovery of damages due to the loss of the life of the said Samuel Fulton.

Wherefore the said plaintiff says that she has sustained direct damages to the amount of Five Thousand dollars, and therefore she brings this suit, etc.

And whereas also heretofore, to-wit, on the 27th day of January, A. D. 1901 and for a long time prior thereto, to-wit in the County of Grundy and State of Illinois, said defendant was possessed of and using and operating a coal mine and being so possessed of said coal mine and being so engaged in the operation of, the said defendant had in its employ, a large number of men, among whom was one Samuel Fulton, who was then and there engaged by the said defendant as a track-man or mine-laborer in said coal mine.

That it then and there became and it was the duty of the said defendant in the use, management and operation of said coal mine when working places in said coal mine were discovered in which accumulations of gas existed to place a conspicuous mark thereat, as notice to all men to keep out as by the statute in such case made and provided.

Plaintiff further avers that there were then and there working places in said coal mine in which accumulations of gas existed all of which had before that time been discovered by the said defendant, and all of which was to it then and there well known: yet the said defendant wholly regardless of its duty as aforesaid, wilfully failed and neglected to place a conspicuous mark at the place in said coal mine where accumulations of gas existed, as aforesaid, as a

notice to the said Samuel Fulton and other men then in said coal mine to keep out, contrary to the statute in such case made and provided; by means whereof and in consequence of such wilful failure on the part of the said defendant, as aforesaid, said Samuel Fulton did not receive the notice or warning of the existence of such accumulation of gas as aforesaid as by the law required, and
30 did not know of the danger which then and there existed in said coal mine, in consequence of the existence therein of said accumulation of gas as aforesaid; by means and in consequence whereof said Samuel Fulton proceeded to and was then and there in the prosecution of his work, at and near the place in said coal mine, where said accumulations of gas existed as aforesaid. And plaintiff avers that while the said Fulton was then and there in said coal mine so in the prosecution of his duty as aforesaid, said accumulations of gas so then existing in said coal mine as aforesaid, became ignited and then and there caused an explosion and the said Samuel Fulton then and there and thereby suffered and sustained such injury as caused his immediate death.

And the plaintiff avers that the said Samuel Fulton left him surviving said plaintiff, Minnie Fulton, his widow, Annie Fulton, Mary Fulton, Alexander Fulton, William Fulton and Maggie Fulton, his minor children, and only lineal heirs at law to whom a cause of action has accrued for the recovery of damages due to the loss of the life of the said Samuel Fulton.

Wherefore the said plaintiff says that she has sustained direct damages to the amount of Five Thousand Dollars, and therefore she brings this suit, etc.

DONAHOE & McNAUGHTON,
Plaintiff's Attorneys.

(Endorsed:) Filed Jan., 7, 1903, Marshall E. Sampsell, Clerk.

And on to-wit: the 14th day of January, 1903, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain Plea to plaintiff's second amended first additional count and amended fifth and sixth additional counts in words and figures following to-wit:

31 *Plea. Filed Jan.* 14, 1903.

Plea to Plaintiff's Second Amended First Additional Count and Amended Fifth and Sixth Additional Counts.

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

No. 26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

And the defendant, by Holt, Wheeler & Sidley, its attorneys comes and defends the wrong and injury, when, etc., and says that

it is not guilty of the said supposed grievances above laid to its charge in the plaintiff's second amended first additional count and amended fifth and sixth additional counts or any or either of them in manner and form as the plaintiff has above thereof complained against it, and of this the defendant puts itself upon the country, etc.

HOLT, WHEELER & SIDLEY,
Attorneys for Defendant.

(Endorsed:) Filed Jan., 14, 1903, Marshall E. Sampsell, Clerk.

And on to-wit: the 19th day of January, 1903, there was filed in the clerk's office of said Court in said entitled cause a certain stipulation in words and figures following to-wit:

32 *Stipulation. Filed Jan.* 19, 1903.

Stipulation.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

In the Circuit Court of the United States in and for Said District.

General No. 26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY, a Corporation.

It is hereby stipulated by and between the parties to the above entitled cause that the plea of the general issue heretofore filed by the defendant in said cause stand as a plea to all counts of plaintiff's declaration not heretofore pleaded to.

DONAHOE & McNAUGHTON,
Attorneys for Plaintiff.
HOLT, WHEELER & SIDLEY,
Attorneys for Defendants.

(Endorsed:) Filed Jan., 19, 1903, Marshall E. Sampsell, Clerk.

33 And afterwards to-wit: on the twenty-seventh day of March, 1905, being one of the days of the regular December term of said Court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Order of March 27, 1905.

Called for Trial and Jury Sworn.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

This cause being now called for trial, now come the parties by their attorneys, and come also the following jury to-wit: Thomas Seaworth, Oly A. Thompson, D. S. Boodwell, Jos. J. Wallace, Thomas Udy, Louis Bleecke, J. H. Bickelhaupt, Charles H. Usher, W. A. Webber, Ed. E. Fisher, G. M. Tindall and R. S. Reber, who were all duly elected tried and sworn to well and truly try said issue and a true verdict render according to the law and evidence, and the opening statements of plaintiff's counsel being heard with a part of the evidence for the plaintiff when the hour for adjournment arrived the further hearing of this cause is postponed until tomorrow morning.

34 And afterwards to-wit: on the twenty-eighth day of March, 1905, being one of the days of the regular December term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Order of March 28, 1905.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Now come the parties by their attorneys, and come also the said jury heretofore duly empaneled, tried and sworn, and the trial of this cause is resumed and the evidence for the plaintiff being now concluded, the defendant's counsel makes the opening statement and a part of the evidence for the defendant being heard when the hour for adjournment arrived, the further hearing of this cause is post-poned until tomorrow morning.

35 And on to-wit: the twenty-ninth day of March, 1905, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said Court its certain motion to direct verdict, which said motion is in words and figures following to-wit:

Motion to Direct Verdict.

In the United States Circuit Court, Northern District of Illinois, Northern Division.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Now comes the defendant by Holt, Wheeler & Sidley, its attorneys, at the close of all the evidence offered on the trial of this cause and moves the court to instruct the jury to find the defendant not guilty.

HOLT, WHEELER & SIDLEY,
Attorneys for Defendant.

(Endorsed:) Filed Mar. 29, 1905, Marshall E. Sampsell, Clerk.

36 And on to-wit: the twenty-ninth day of March, 1905, being one of the days of the regular December term of said Court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Order of March 29, 1905.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

Now again come the parties by their attorneys, and come also said jury heretofore duly empaneled, tried and sworn, and the trial of this cause is resumed, and the evidence on behalf of the defendant being now heard and concluded, together with the arguments of counsel, said jury are charged and instructed by the Court and retired to deliberate upon a verdict, attended by a sworn bailiff, with leave to seal their verdict if they shall have arrived at a conclusion at a time when Court is not in session.

37 And afterwards to-wit: on the thirtieth day of March, 1905, being one of the days of the regular December term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Order of March 30, 1905.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

Now again come the parties by their attorneys, and now come the said jury and return into open court their verdict finding the defendant guilty and assess the plaintiff's damages at the sum of four thousand dollars ($4,000) and thereupon the defendant enters its motion for a new trial.

38 And afterwards to-wit: on the first day of August, being one of the days of the regular July term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Judgment of August 1, 1905.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY OF COAL CITY.

Now on this day come the parties by attorneys, the plaintiff being represented by Messrs. Donahue and McNaughton and Eddy, Haley and Wetten, the defendant by Messrs. Holt, Wheeler and Sidley, and now comes on to be heard the motion of the defendant for a new trial, and the Court having heard the arguments of counsel upon said motion and being now fully advised in the premises, overrules and denies the same, to which ruling the defendant excepts and enters its further motion in arrest of judgment, which the Court also overrules and denies, the defendant further excepting and awards judgment upon the verdict.

It is thereupon considered and adjudged by the Court that the plaintiff, Minnie Fulton have and recover of said defendant, Wilmington Star Mining Company of Coal City, the said sum of four thousand ($4,000) dollars, her damages so as aforesaid assessed, by said pury on March 30th, 1905, together with interest at five (5) per cent. from said date, being the sum of sixty-six and
39 66 100 ($66.66) dollars, making a total amount of judgment of four thousand sixty-six and 66 100 ($4,066.66) dollars besides the costs herein to be taxed and that execution issue therefor and thereupon the defendant enters its motion for a writ of error to th Supreme Court of the United States, the Court fixing the amount of bond on writ of error in the sum of five thousand ($5,000) dollars to be filed within thirty days and to operate as a supersedeas and

sixty days is allowed the defendant to prepare and present its bill of exceptions.

40 And on to-wit: the sixteenth day of August, being one of the days of the regular July term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Order of August 16, 1905.

Extending Time to Perfect Writ of Error.

26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

On motion of the defendant's attorney, and upon stipulation filed, It is Ordered that the time for the defendant to perfect its writ of error and file bond be and the same is hereby extended sixty days from August 1st, 1905.

41 On the hearing of this cause the following Exceptions were taken and were allowed by the Court and made of record, which said exceptions are in the words and figures following to-wit:

42 *Bill of Exceptions.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

Bill of Exceptions.

Be it remembered that heretofore, on, to-wit, the 27th day of March, A. D. 1905, the same being one of the days of the March Term of said Court, before the Honorable Solomon H. Bethea, one of the judges of said Court, presiding, and a jury, this cause came on for trial upon the issues heretofore joined herein.

Messrs. Eddy, Haley & Wetten and Donahue & McNaughton appearing for plaintiff, and

Messrs. Holt, Wheeler & Sidley appearing for defendant.

And thereupon, the plaintiff, to maintain the issues on her part, introduced the following evidence, to-wit:

43 EDWARD PIERARD, a witness produced on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. HALEY:

My name is Edward Pierard, and my place of residence is Coal City. I have lived in Coal City in the neighborhood of 20 or 21 years, and am 32 years old. My occupation is that of miner or mine examiner, and I have been mine examiner since 1900, December, I think. I was a mine examiner in January, 1901, and was working for the Wilmington Star Mining Company. I have been employed by that Company altogether in the neighborhood of 15 or 17 years, and as a mine examiner since 1900, in December some time, and have continued ever since in that capacity for the same Company. I had been an examiner about one month before the accident at the mine in which Fulton was killed. I had been an examiner something like about one month in January, 1901. The Wilmington Star Mining Company had two mines at Coal City numbered 5 and 6. At that time I was employed in No. 6. I was called a fire boss and a mine examiner, and I still continue to work for the same Company in the same capacity. In January, 1901, my duties were to examine the mine for the men about to work. I looked to see if the air was traveling all right, if I could find any gas, etc. I couldn't say exactly how long No. 6 had been in operation at that time; four or five or six months, I guess. I couldn't call all the roadways or principal outlets from the mine which were excavated in January 1901. There were main driveways or roads extending from the bottom of the shaft, into the face of the coal where the men worked in the east, west, south and north. These, I should judge, were something like six feet high and six or eight feet wide. After the coal got upon the principal driveways, it was carried on pit cars. The miners loaded the coal at the face of the works. I do not know whether the miners had anything to do with the pushing it out of their rooms; some of
44 them did push it. It was finally put on the roadway, and then by truck carried to the bottom of the shaft and hoisted up to the top. These south, north, west and east roadways, in miners' parlance, were called "headings," and there were four principal headings extending north, south, east and west from the bottom of the shaft. There was also an air shaft.

Q. What was the distance of the air shaft from the shaft proper where the coal was raised, if you know?

To which question the defendant by its counsel then and there objected, for the reason that there was nothing charged with reference to the distance of the air shaft from the other shaft, that being a statutory equipment not counted upon in this action, and because the statute is to be strictly construed with reference to its various provisions, and there is an express reference to the distance of the air shaft from the other shafts which is not counted upon here, the provision being confined to its terms and to its own language. And this objection the Court overruled, to which ruling of the Court the defendant by its counsel then and there duly excepted.

A. I could not say for sure. The distance is somewhere about 300 feet, probably a little more or a little less. There was an opening between the shaft proper and the air shaft; I could not tell how long before January that opening had been made. The headings of the mine were not connected in January, 1901. There was only the east and part of the north that was connected.

Q. What effect, if you know, would the lack of connection have upon the free circulation of air in the mine?

To which question the defendant by its counsel then and there objected, for the reason that there was no charge of failure to
45 connect the various roadways in the mine, and it was not counted upon, which objection the Court overruled, to which ruling of the Court the defendant by its counsel then and there duly excepted. (Question read.)

A. I do not understand that right.

Q. Would the lack of cross cuts or connections in the mine have any effect upon the free circulation of air?

A. Why, there is no cross cuts in a long wall mine, you know.

Q. Eh?

A. There is no cross cut in the long wall mine.

Q. What is the cross cut?

A. The cross cut?

Q. Yes.

A. It is a hole which is into the main road, or something, to get air.

Q. Is there any cross cuts in this mine at all?

A. No, sir.

Q. Well, what connection, if any, was there between the roadways?

A. Why, while it was open, it was clear around; the wall was open all around.

Q. Well, was it open all around?

A. No, sir.

Q. Well, how much of it was there that was open all around?

A. I stated that it was not open.

Q. The east was not open?

A. Well, hold on, you asked me if the east was open?

Q. No, I do not ask you anything about the east. I asked you what part was not open.

A. Was not open?

Q. Yes.

A. Well, the west and the south.

Q. Well, then, what effect would that have upon free circulation of air, the fact that it was not open, if any, at all?

A. You would have to work around until you came to get air into it, open the air up.

46 In event of foul air or gas forming in the rooms that were not connected, the gas could be driven out with a little blower that we have, a little fan and fan engine. Beside a fan, we generally had to use in a hole where there was a little gathering a sack or something to take it down. We used a sack or an old coat or

something, brushing it in so that it would scatter the little gas that was left in the hole. I could not answer the question as to how long it ordinarily took to free the mine from gas after the fan started and after I had gotten into the mine and got to work as fire boss or mine examiner before the men went to work. I never tested it. I generally started the fan in the morning sometime, five o'clock, half-past five, or something like that. The men came down for work at half-past six in the morning; I had the fan started, probably an hour or an hour and a half before they came, may be more, some times. I knew that the mine was free from gas before I told the men in there to work because I examined the same. I went in with a safety lamp and examined it to see if it was all right; the miners generally carry when at work a naked light, a pit lamp pasted on the hat or cap; a safety lamp has gauze all around it; if there is gas in a room or mine, and you go in with that lamp, it would whistle inside. The gas will catch in it, burn in it; it will not blow up. We know from the appearance of a safety lamp whether there is gas in the room or headings in the mine. In case miners go in there with the exposed light, if there is any gas, it would explode like powder.

I was acquainted with Samuel Fulton in his lifetime. I knew him ever since I came to Coal City. He was a miner, a track layer, hand all around, sometimes flagging, sometimes track-laying. He worked for the Wilmington Star Mining Company when I knew him. He started working in No. 6 after I did. He came when we were sinking. I couldn't say how long before January, 1901,
17 that was. He was working there in that mouth before he was killed. I think he was track laying after the shaft was sunk, laying track and roadways for the pit cars to run on. The Company's men laid that track. The track was usually laid through the day, any time. Sometimes it was laid on Sunday. I remember the day of the week when Mr. Fulton was killed. It was on Sunday morning. I was not at the mine the night before he was killed. I left Saturday morning, I should judge about seven o'clock. There was no other fire boss or superintendent at that mine except myself. I next went back to the mine a little before seven o'clock Sunday morning, probably six or seven minutes before seven. An engine operated the machinery or cage, elevator. This engine was in operation when I got there. Moses Capet went with me to the mine. He is still living and working for the Company, but not at the same mine. I saw the engineer at the top of the mine when I got there; I can't tell which one of the engineers; there were three; I think it was Bromley. Johnnie Wilson was mine manager at that time. He was not there when I first got to the mine. I passed Mr. Fulton on the road. He was going to the shaft. I saw Mr. Schmitz at the shaft. When I got to the shaft I sat down two or three minutes. Then I saw the mine manager, Mr. Wilson, coming. I don't think there was anyone with him. It was pretty near seven then, and we picked up and went down, me and Moses Capet. After we got down, we threw off our coats, put down our buckets, and started in the south road.

Mr. HALEY: Have you got that map here, Mr. Sidley?

Mr. SIDLEY: I have some blue prints which are the same thing. (A blue print was then produced by Mr. Sidley.)

Q. First, I will ask you to look at that map. I assume the top of this is north, and, after having examined it, state whether
48 or not it represents substantially the situation at the time Mr. Fulton was killed?

A. Yes, that was about the right thing.

The top of this is north. Capet and I went south; that would be into this heading with the two cross roads. I don't call them cross cuts. The cross road is a place to put some tracks, and the cross cut is a place for air. We didn't have any cross cuts for air in this mine. Those crossings on the east are rooms opened up; they are not through cuts. Capet and I started right from this south heading to dig holes in order to get air boxes so as to get fresh air in to the men that were working in that direction that day. Capet and I were working there. Besides passing him on the road, I saw Mr. Fulton on top of the shaft. When there, he said that he wanted to pick out a car-load of ties, and Mr. Schmitz went and helped him. He didn't go down as soon as I did. Me and Capet went down first.

The fan that was operated for the purpose of clearing gas out of the mine was at the bottom of the shaft; I passed right beside it to get at the bottom of the mine; it was not then in operation. I did not start it nor try to start it. I knew at the time there was gas in the mine in that section; always had some in it. I didn't know that Fulton and Schmidt were going into the section; into the west. I knew they were coming down into the mine to lay switches somewhere. I didn't make any effort to get the gas out. The fan is operated by steam generated at the top, but not by the same engine that furnishes power to the cage or elevator. Very likely the same boiler makes the steam. The steam is communicated from the boiler to the little engine that operates the fan from the bottom by a steam pipe coming along all the way down the side of the shaft. In order to start the fan in operation, if there was steam in the boiler at the time at the top of the shaft, I would have to open up that
49 valve; a valve at the engine and one at the pump; the fan was right close to the engine. The apparatus used for the purpose of starting up the fan letting on the steam was a wheel; that wheel was there all the time. The simple opening of that valve by turning the wheel would start the fan; we would have to help the engine, turn to get her started; we would not have to do anything else. If the pump had been stopped or the fan had been stopped from the Saturday night before, the steam was shut off at the pump in order not to have water from the condensed steam rise from the pump to the fan. There was a valve at the pump. The valve was all right with the exception of the wheel; there never was a wheel on there; there was a place to put a wheel; Mr. Wilson put the valve on; there was no wheel to it; it was started with a wrench; if you wanted to tighten it up, you tightened it with a wrench. Suppose you wanted to let the condensed steam out in order to get condensed steam to your fan, you just opened it up with your wrench, started it,

and operated it with your finger. We didn't get live steam to that fan without opening up the valve and letting out the water or condensed steam. I don't know where the wrench that ordinarily opened that was that morning. I don't know how it was opened up that morning at that particular valve; I think Mr. Wilson opened it up; I couldn't say I saw him. I think he got that wrench on top. I didn't make any effort to find the wrench that I know of. I didn't do anything to open up that valve to let the water in so that steam might be got to the fan. I saw Mr. Fulton down in the shaft that morning. I was in the south road when he came down. I could see him from where I was. Mr. Wilson was with him. Schmitz came down ahead of him. Schmitz took down some rails, I could not say what it was, he left them at the bottom of the shaft and belled the cage away; that is, he gave a signal and it went up.

50 Then a carload of ties came down. Fulton was not down there before the car of ties came down. Mr. Schmitz pulled the car of ties off the cage and belled it away again. Then Mr. Fulton and Mr. Wilson came down with some switch pointers. A switch pointer is a short rail for a switch. They had them on the bottom of the cage, and after the cage came down they put them on the top of a load of ties, on the pit car. The four of us—five of us—stayed there and started the fan together. There was me, Capet, and Fulton and Schmitz and Wilson; I stayed right there with them and turned the wheel; not the wheel of the fan, the big wheel. That is all I did. I couldn't say now what Wilson was doing. Capet was right there. I don't know that he did anything except to be there. Fulton and Schmitz were all standing there. After the fan was started, I walked in the south room. Schmitz and Capet walked in with me. I saw Wilson walking in the end of the south road. I couldn't say how far down toward me Wilson came. He was on the plate when I left. After he got onto the south road, he didn't get up quite as far as where I was. Schmitz came right up where I was and stayed there two or three minutes, and then he went back to the bottom.

Q. He was at the bottom all that time, wasn't he?

A. He was at the south road. I call the bottom, that is, the plates. He went back to the shaft and I stood in the south road. Mr. Wilson called him when he went back.

Q. What did you hear Wilson say to him?

To which question the defendant by its counsel then and there objected on the ground that conversation between Wilson and Schmitz, who was not a party to this suit, is not competent in this action; that it was not a direction by Wilson to Fulton, but by Wilson to Schmitz.

51 The COURT: Was Wilson present and did he hear him?

Q. Where was Fulton when Wilson called Schmitz?

A. He was on the plates.

Q. How near was he standing to where the others were?

A. Well, I couldn't say; within twenty-five or thirty feet, something like that.

Q. Was he as near as you?
A. No.
Q. Did Wilson speak loud enough so that he could be heard?
A. Heard him hollering to Schmitz; that is all I heard.
Q. He hollered out to Schmitz?
A. Yes sir.
Q. And he and Wilson were in near the shaft at that time, is that right?
A. Fulton was more in the west. He was on the end of the plates or bottom, sitting on the cab.
Q. And how near to Wilson?
A. Well, I should say about twenty feet; twenty or twenty-five.
Q. How far were you from Wilson?
A. Thirty or thirty-five feet.
Q. Did you have any trouble hearing Wilson?
A. No, I was in the road.
Q. I understand all that; the other man was in the bottom?
A. There was an awful racket with this fan; while the fan was going, the engine.

The COURT: Have you shown who Wilson was?
Mr. HALEY: I have shown he was the mine manager.

Q. Wilson was your mine manager, wasn't he?
A. Yes sir.
Q. He had the mine in charge, boss of the mine, wasn't he?
A. Yes sir.

The COURT: What power and authority did he have? Hadn't you better show that?
52 Mr. HALEY: The statute fixes that, your honor.

Q. Under whose direction were you all working or mining; as far as you know, who was the boss?
A. Mr. Wilson.
Q. And he was then in the employ, you say, as mine manager for the Coal Company?
A. Yes, sir
Q. And had been for some time before that?
A. Yes, sir.

Mr. HALEY: Now I think I have a right to ask what he said?
The COURT: Do you renew the objection?
The defendant by its counsel then and there renewed its objection to said question, on the ground that unless it appeared that Fulton heard this command given, or unless it was given to him, then that a conversation between Wilson, the manager, and Schmitz and other workmen, would not be competent in this action; which objection the Court overruled; to which ruling of the Court the defendant by its counsel then and there duly excepted.

Q. What did you hear Wilson say to Schmitz when he hollered at him?

To which question the defendant objected on the same ground as the last previous objection, which objection was overruled; to

which ruling of the Court the defendant by its counsel then and there duly excepted.

A. He said, "You will work with Fulton to-day," something to that effect, something like that, I couldn't say exactly now.

Then Schmitz came walking out. I have no better recollection of the words he used. When he spoke to Schmitz that what I have given you now. He said he would work with Fulton to-day; that is that I understood. I was a witness before the Coroner, and
53 that is what I then stated was said by Wilson, I think. After that talk with Schmitz he left the room where I was, and I didn't see anything of him after that up to the time of the explosion. After Schmitz left, Wilson was in the south road, in the ways, the south road. That is where I was. I was right up here some place (indicating on the blue print). I judge I was about thirty-five or forty feet south of the shaft opening Wilson was on the south end of the boxes. We had boxes there propped up for to put up. He would be probably twelve or fourteen feet; something like that, sixteen feet in from the snaft opening. Wilson was in the south room when he hollered this, and then Schmitz left. The next thing I heard was a little while after an explosion occurred; I felt it, it knocked me down.

Q. How far were you from where you found the cause of it was?

A. Well, I couldn't say exactly. It would be forty or fifty feet south, and there was no whistle. It would be, I don't know, seventy-five or eighty feet, probably one hundred.

I was in the south road about forty or fifty feet from the point of intersection of the south roadway with the shaft. After the explosion occurred and I was able to get up, I looked for a match. Mr. Wilson lit the match for me, and lit his lamp, and he walked out and I followed him. I came on the road here on the main shaft, and then up the west; up the south roadway of the westerly roadways through the mine. When I went into that westerly heading, as soon as we got a light, Mr. Wilson got a light, we heard Paul hollering on us; Paul Smith. His name was Schmitz. We met Schmitz coming out, I couldn't say, seventy-five or eighty feet, probably, from the bottom, may be a little more, west from the main shaft. We found Sam
54 Fulton probably twenty-five or thirty feet further up, something like a hundred feet, I suppose, eighty or one hundred feet west from the main shaft; I never measured I saw the car that they had up there, and the ties and the points and the switches. Fulton was lying on his back when I got up there, and he was dead. We picked him up and carried him out through the main shaft. The wall of the mine was all right; the boxes up on ahead was broken, some of it smashed. The car was all right, off the track. Schmitz was burned. I could not tell you how near to the place I found Fulton. It appeared to me that the gas had taken fire. I was thirty or forty feet from the main shaft south, and found Fulton about a hundred feet west, so that taking it around and following the angles about one hundred and forty or one hundred and fifty feet, it knocked all of us down in that heading. This was on Sunday morning, January 27, 1901.

I could not say about what time it was in the morning that I went down in the mine, about seven o'clock; I should say it was about twenty or thirty minutes after I got down into the mine when Wilson finally came down. From the time Wilson came down until he came back and got the monkey wrench to open the valve to let the water out for the starting of the fan, was a few seconds. He just went up and down again; I couldn't say how many minutes. I recall being a witness before in this case. I couldn't say how near to eight o'clock it was that morning before the fan started. My best recollection and judgment as to the time is that I don't think it would exceed much after half-past seven, around thirty-five minutes. It was just a very short time after the fan started until after the explosion, something like five minutes. No one to my knowledge had been up the west heading of the mine that morning ahead of those men. I never tried from my own experience how long it takes after the fan starts to dislodge the gas and get a current of fresh
55 air in the mine. I never tested. I couldn't say how long it would take after the fan started before you let the men into the mine before the gas was out. My best recollection as to the length of time is that sometimes I started at five, sometimes half-past four, and sometimes a little after five; not very long after five. I couldn't say how long I have known gas to remain in those rooms after I started the fan, by an actual test. Generally when I went in, it was all clean except this hole.

Q. Well, have you known it to stay there a half hour?

A. I couldn't say, you mean after I started the fan?

Q. Yes. Well, as a fire boss, was it not part of your duty to learn something about that thing?

A. To see that the thing was clean for men in mining.

Q. You did that by the lamp, didn't you?

A. Yes, sir.

Q. How long a time did it take after you started the fan till your test showed there wasn't any gas in the mine?

A. I couldn't tell, I never made a test. I went up there to see to make a test of it.

Q. Well Sunday morning this man was killed you never made a test of any kind?

A. No, sir.

Q. Why didn't you make a test of the mine that morning before those men were allowed to go in?

A. I was not there for that purpose that morning.

Q. Why weren't you there for that purpose?

A. I was on a special job; I was on for putting those boxes.

Q. Who told you that?

A. The mine manager.

Q. That you were not to make a test?

A. No, he didn't tell me that.

I went out that morning on a special, another job. The gas would not be taken out of the mine unless the fan would go. The
56 mine manager was there. Wilson did not tell me he would look after the gas that morning. No one told me they would

look after it. I was under the boss that morning. There was no sign or indication placed upon the west headings or headways, roads, indicating that they were unsafe or that there was gas. When I found gas in the mine that was not dislodged by the ordinary operation of the fan, I took it out and reported it to the boss, the mine manager. I was in this westerly road before the Sunday morning that Fulton was called every morning.

Q. Did you ever find gas in there?

A. Yes, sir.

Q. Did you know that gas was in the habit of communicating here?

A. Yes, sir.

Q. Did you know it would be there unless it was taken out.

A. Yes, sir.

I can tell you about the dimensions of the vertical shaft at the bottom. This bottom of plates, this square that is indicated here (on the blue print) is about fourteen feet square, I think; I never measured it, I could not say for sure. The air boxes were in the south; on this square place. I don't think there was anything except this car of ties was partly on the west. This part marked "main shaft" is an opening inside this fourteen foot square. The opening where the bucket runs up and down, or the elevator, was I think fourteen or sixteen feet long and five feet and something wide, that is, without the partition that is between; there are two partitions and two elevators used for hauling up the coal and material from the bottom of the mine. On this map, the westerly end of it, there are some things indicating the large openings. These were in existence at the time of the death of Fulton. I have a distinct recollection of that. The other artificial means of ventilation of that, except the fan, at the time of the death of Mr. Fulton, was the air coming down the air shaft. It came down and came up the main shaft. There was no fan in the air shaft, and nothing in it except the opening from the bottom up. This could not help out the west roadway at all.

57

I last saw the monkey wrench that was there, that we operated the valve with, on Saturday morning when I left the shaft. I couldn't say whether it was there the Sunday morning when this man was killed.

Q. Do you know whether it was or not?

A. It was not, because John went up for another one.

Q. When you found that that monkey wrench was not there, did you order the men out of the mine?

A. No sir.

Cross-examination by Mr. SIDLEY:

On direct examination I stated that the air came on the east side of the mine down the air shaft and up the main shaft, and that created a current. There was a constant up current in the mine shaft on account of this circulation coming through from the east. This constant up draft from the bottom of the mine also affected the air over here on the west side of the mine a little. The up current in the main shaft would affect the air in the west shaft up to the

empty track. The empty track is that road cut through the west. I mean the north road of the two parallel west roads that comes down into the main west track. Up that far that up draft would keep the air clear enough in that part of the west part of the mine so that a person could go in there without any artificial draft by fan or otherwise. Beside this, there was those steam pipes which helped create a draft from the bottom of the mine. The heat, you know, would cause a draft, the steam going down to the bottom in the pipe came onto the fan. The condition of the air at the bottom of the shaft when the fan was not working was all right; it was always good, and we needed no artificial ventilation for the bottom of the shaft. This extended also into the south shaft part
58 ways; pretty near into the face, with the exception when they were working for a day or so would stay by. The air in the south shaft the Sunday morning when Capet and I and Schmitz and I were in there, was all right. We didn't have any artificial ventilation there; we were going to put in those boxes. By the face I mean right at the end as it has been worked. The fan or blower that was operated by the engine at the bottom *at* took care of the west roadway of the mine, and also of these branches up at the end of the west entry of the west roadway. The fan made good air in there after it had been working for a sufficient length of time. I couldn't say how long I had been working in this west roadway before this accident occurred, five or six months, probably a little more. I inspected regularly in that west roadway before the men went to work. I began inspecting a little after they begun to run the west roadway. I think they were in about half-way from the plates when I got on mine examiner. By plates I mean the bottom of the shaft, the main shaft. There is an iron plate there. There is an iron bottom plate there. Before I began going in for inspecting the air they had proceeded in that roadway half way to the empty track, that is, where the empty track comes down into the main track, or half way from the shaft to the roadway; up to that point the way was all right. I began examining when that west roadway had been put in half way from the bottom to that empty track. The fan was not put in at that time. There was a little gas then in the west road. I always found gas in the west road. The fan was put in when they had got past that empty track a little in that west road. Up to the time that the fan was put in, there was always gas in the west entry, and we worked in more or less gas there until the fan was put in. I could not say whether Fulton worked with me in there those days before the fan was put in
59 or not. I know he used to be on that road before the fan was put in. He was laying track in there. His business in the mine was track layer. There was nobody else laying track beside Fulton that I know of. I think Fulton laid pretty near all the track that was laid in the mine. It was a couple of months, anyway, after the fan was put in before the accident occurred. After the fan was put in, there were twelve or fourteen men working in that west entry every day for quite a long while. For two or three months they were driving those roads in order to get the mine opened up. In order to get the air to circulate all around. They began

to sink this shaft No. 6 in April or May, 1900; I couldn't say for sure. There were three shifts of men at work there from that time on, four in each shift. Three shifts worked from seven to three, and three to eleven, and from eleven to seven, eight hours a piece. They were sinking a mine. I mean by sinking, digging down to get into the coal. When they got down to the bottom, they began to open up the shafts. In opening up the shaft in the bottom of the mine, they cut out the coal and stone and make roads. I was familiar with the work that was being done and planned in the bottom of the mine before the accident. They were working in order to get the mine opened out the same as it is on the east side here, cutting narrow work; cutting openings clear around to make a circle all around the mine. The east side of that mine upon this plat had been opened up at the time of this accident to right there on the east second road (indicating). There was a current of air in the east part of the mine as far as that was opened out. There was more to do to the east side before it was finished back southeast. What was to be done here in the beginning was to come through onto this southwest road. This spur road here was to be brought west to connect with this branch running east. The object of
60 that was to get air to travel all around the mine. It was our object in working through the west side of the mine to finish it up in the same manner. It is to be in order to get air to travel ad around. It was our purpose to run our roadway near there which runs northwest, to run it westerly to connect with the branching road which was running northeast. It was our intention to connect this south spur road here running easterly over here with this south road, that is what I mean by saying that when that was done the mine would have a circulation of air. At the time of the accident, the work had progressed only so far as shown upon that plat. There were three shifts on that work prior to the accident. We were not mining coal in the mine at that time; driving roads in order to open up. The stuff we took out was fetched on top. I think they burned it in No. 5 most of it. The sort of material we encountered in there making the road was coal and stone and sulphur.

There is a person in the mine known as a miner. The miner has anything to do that is in the mine. He is an all around man. Beside laying track, I believe Fulton timbered some. He was sinking in this mine. I couldn't say when he began to work on this shaft 6 before the accident; it must have been two or three months after we got started. June or July sometime, 1900, some thing like that, probably before, I couldn't say. He worked from that time to the time he was killed. He was sinking at first, and when *when* he got down he was a track layer, a track man.

Q. You said there were no cross cuts in this mine?

A. No, sir.

Q. Why were there no cross cuts in this mine?

A. This is a long wall mine.

Q. What do you mean by a long wall mine?

61 A. There is no cross cuts in a long wall mine, it is all circular all around.

Q. What other kinds of mines are there?

A. Room and pillar, there is where you get your cross cuts, big veins.

Q. Does the long wall mine never have cross cuts in it?

A. No, sir, they run where there were doors on the cross cuts.

Q. The room and pillar mines are the ones that have cross cuts?

A. Yes.

Q. What is the difference between a room and pillar mine and a long wall mine?

A. The difference?

Q. Yes, can you describe a room and pillar mine?

A. A room and pillar, there is two entries driven together.

Q. Parallel?

A. Yes, and there is where the cross cut comes in. When they go in so far, they have to put a cross onto the other one in order to have the air come around. That is what they call a cross cut.

Q. Do they take all of the coal out of the room and pillar mine?

A. No.

Q. What do they do with that which is left sitting there, what for?

A. So as the roof won't come down, I guess.

Q. You mean for support?

A. Yes.

Q. For pillars?

A. Yes.

Q. Then, if I understand you, a room and pillar mine is one where they start from the bottom and run two parallel shafts?

A. Two roads.

Q. Two parallel roads, and after they get down a certain way in order to get air circulating, they cut a road across?

A. Sixty feet.

62 Q. Every sixty feet?

A. Yes.

Q. And that is what they call a cross cut?

A. A cross cut.

Q. And what is its purpose?

A. In order to get air to its face.

Q. After they have gone in sixty feet and put in a cross cut, then what do they do?

—. They go in sixty feet more and put in another cross cut, put in a stopping to this cross cut.

Q. A what?

A. A stopping, that is, follow this up, this first one. The first cross cut follows in so as the air would travel to the next one.

Q. And how do you follow it in?

A. With stone, some brick, some lumber, some board.

Q. And what do you call it?

A. Stopping.

Q. A stopping?

A. Yes.

Q. Does a stopping always accompany a cross cut in mines.

A. And there is another cross cut at the face. This first one has to be filled in.

Q. Then, as I understand it, they go in sixty feet with two parallel tunnels.

A. Yes, sir.

Q. Then they put in a cross cut to let the air through?

A. Yes, sir.

Q. Then, if they want to go on sixty feet further and put in another cross cut, they follow in the first one.

A. Yes, and allow the air to go right to the face.

Q. Then the air would only go into the first cross cut and go back?

A. Yes, sir.

Q. And the stopping is what they put in the first cross cut to shut it off?

A. Yes, sir.

Q. Do they have cross cuts and stoppings in long wall
63 mines such as this?

A. No.

Referring to this valve, which has no wheel, it was started with a wrench, just to give it a start, and then started with your fingers; open it up with your fingers. The wrench was used to shut her tight in order not to have a condensed steam all along the pipe from the pump room to the fan engine. It was just as easy just the same to start it with the wrench as it was with the wheel and then use your fingers to finish it; it was always on. That was the regular way of starting this valve while I was in the mine. It was put on that way, and had been in that condition ever since it was put in.

When I went down to the bottom that Sunday morning about seven o'clock or a little before, I first took off my coat and went into the south road. I couldn't say how long I remained in there; till the other fellows came down. By the other fellows I mean Fulton and Schmitz and Wilson. Then we walked out to the bottom and the fan started. Five of us were there at the bottom when the fan started. When the fan was started I walked in the south road again. Fulton was then on the plates by the engine; the little engine, sitting on the back of the car with his hands folded this way (indicating). The engine was situated right there (indicating on the blue print), the first square west of the south entry in the bottom. The fan was right next to it; it was only a little distance between, the next square place at the west of the first one. Schmitz went with me into the south entrance. We went, I should judge, about 40 or 50 feet. I stopped right at about 50 feet, and Schmitz stopped with me. I was digging a hole in the wall on the east side of the south roadway to put in a stick in order to get those air boxes in. Schmitz was not helping him. He just followed me in after I went in there.
64 These air boxes are four sides and open at the end, the boards 12 inch, I think, or 14 inch, in order to drive air into they were used by the fan to drive air through; that is, you make a continuous row of them end to end. The fan drives the air through these boxes all around. They are used to convey the air right to

the face. I mean by the face the end of the workings, at the end where they are working at it. They are air boxes in all mines where they are not completed. In the new mines they generally have them, and when a circulation is all around they have them take them out. Capet followed into the south entry too. He was the man with those boxes. He must have been in 16 or 18 feet, something like that. Wilson was right along with Moses. Moses was cutting, I think—Mr. Wilson was holding the stick for him. Capet came into the south entry about five or six seconds after me, just followed in. I don't know how long after that Wilson came in; he was with him. I couldn't say. When I happened to turn around and saw them all in there, he was in; seen him about four or five minutes afterwards. They had pit lights. I had a pit light and Schmitz had one. Wilson was in the south road with Capet when he called to Schmitz. He was at the place where he was working with the stick. Schmitz came right out when Wilson called him. He passed Wilson; I seen him going out. Nobody went with him that I know. I saw Wilson and Capet after Schmitz left me. They were right there in the south road. I couldn't say how long after Schmitz left before the explosion; four or five minutes; three, four or five minutes. Between the time that Schmitz left me and went out, neither Capet nor Wilson went out of the south entry that I know of. I never seen them go out; I saw them working there. He was holding the stick for Capet. When the explosion occurred I was looking for a match, going through my mit; looking for a match. I didn't find one; Wilson laid one before me. Wilson was in the south room when the explosion occurred, thirty or forty feet from me. Capet was a little on this side of me in the south entry. After the explosion I went up into the west entry, I should judge about eighty or a hundred feet. I first met Schmitz and gave him Moses, and he walked away with him, and I went behind Wilson and got Fulton. I found Fulton about probably twenty or thirty feet this way from where this empty track road came into the main west road, that is, twenty or thirty feet east of there. I didn't go on beyond that point at that time, not that day. I went in next on Monday. At that time I went to the end of the boxes; to the face. The boxes were broken on the end road, that is the first one, the one marked "A" in the plat. I found some at the point where the road runs into the west road. They were all broken on that road marked "A." I think there was one beyond that point west in the mine, and one broken where this road A comes into the west road, and where the empty track road came in they were broken into splinters; it was the explosion that broke them. The walls were all right, solid walls. On the track there was a rail lifted, twisted. The car was off the track; on this side of the empty track, east of this road which is marked "B" down here (referring to the plat). The west part of the mine beyond this empty track B was on an up grade. The ascent began about half way on that west road, some ways east of where this empty track B comes into the west road. It was going up from there on. The tracks were laid at the time of the accident in the West entry to the face in a straight road. That road is marked "C" on this plat

toward the west end. The rails had been laid to the face, that is, to the very end of that straight road. They had also been laid down both sides to the road, down this road marked "D." There they had been laid up to the face with the exception of the switch coming back east.

66 Q. (Referring to the plat.) And that little turn out to the east there was in the track laid in there, there was no switch there, was there, any track up this road marked A up to the northwest?

A. Yes, sir.

Q. Was there any beyond there in the mine in the west?

A. No.

Q. Around the face?

A. That was all; no.

At the time of the accident and shortly prior to that, my regular hours in the mine were eight hours at night, from half past ten, eleven o'clock to seven; I didn't go in alone; Schmitz was working with me at the time. While I was on duty in the mine during the night, I was working at all kinds of work, anything that was to be done. I started the fan in the morning about half past four or five o'clock before the fan was started, some times we were driving on the road, sometimes timbering. Before the men came down I went in to test in the west entry; to examine the mine. There was no gas anywhere except in the west entry. There had been gas in there a long while; four or five months; three or four months. I never made a test to see exactly how long it took the fan to clear out. I generally went in with a safety lamp, always at six o'clock or a little after. I don't know just what time the air changed from bad to good, or when the gas was all out. When Schmitz and I were in the mine there during the night before the men came down, we worked all over the mine; sometimes in the west entry as well as in the other entries. At the time of the explosion, I was a certified mine examiner. I got my certificate at Springfield, and have it with me.

(The witness then produced a certificate, which was offered by counsel for defendant for identification as "Defendant's Exhibit A.")

67 Q. You brought the question of these patent lamps. I will ask you if that is a lamp such as you miners wore usually at that time, what you describe as a naked lamp (showing witness a lamp)?

A. Yes.

Q. And you each of you had one of those at the time of the accident, did you?

A. Yes.

Q. And were using it in the mine?

A. Yes.

A safety lamp is a lamp with gauze all around it. It stands that high (indicating), and you go in and examine a mine with it. If there is gas, it would not light. It will show you in the lamp. That was the light that I used mornings for testing. There was one of

those lamps in the bottom; right in the pump road, that is the north road; right on the end where it came into the shaft.

I had known Fulton since I came to Coal City; that is twenty years, any way. When I first knew him he was working at the old shaft for the Wilmington Star Mining Company; I don't know the number. Before the accident I worked with him in No. 6, the mine where the accident happened, in the day and not at night. I had worked with him when I was working night and day. I ceased working during the day and began night work in December sometime, 1900, after I got my certificate. I believe it was about that time this blower fan was put into the mine, and after the fan was put in I began my examining work at night. Previous to that I had worked in the day-time. As to the habit of working Sundays, I believe sometimes we worked Sundays. We worked Sunday right along when we were sinking. Beside that of mine examiner, I had to do any kind of work that we was ordered. The mine examining part of my work consisted in examining the mine in the morning so the men could come down right after. That did not take a great while. Beside that, I cut in those roads, put in boxes some-
68 times. On the Sunday morning when the accident happened, I went down into the mine to put in those boxes in the south, and I examined some on the west. That was the only work I was directed to do on that morning. I hadn't worked Saturday night. I worked Friday night and left Saturday morning at seven o'clock. There was no regular shift of men working in the mine on this Sunday that I know of. While I was working in the day time, I had work with Fulton in all parts of the mine; in all the roadways; I am not sure whether I had been in the south roadway with him; I don't think it was in at that time. I think I have been in other roadways with him; I couldn't recall.

Redirect examination.

By Mr. Haley:

I couldn't say how many men in all worked on one shaft in this mine in January; somewhere around forty; thirty-five or forty, I guess altogether; there were not three shafts at that time. After the shaft had been sunk, there was a little while there was three shifts in cutting those roads. In January I think there was only one shift, that was a day shift. I couldn't say how many men were employed on that shift. Something like thirty, I guess, worked down below in that mine. They were driving those roads.

Q. Were they mining coal?

A. Cutting those roads.

Q. Well, was that mining?

A. We call that mining, yes.

Q. They then mined the coal and took the earth out, and the coal then fell down, and they loaded it on the cars and sent it off?

A. They cut it, they didn't undermine it at all.

Q. Well, then, they cut it; they did the ordinary mining.

A. They did the narrow work. What we call the narrow work in a new mine. Opening up, getting ready.

Q. Was it cutting out and digging coal?

A. Yes, it was taking out coal; yes.

69 Q. How long had they been digging coal out of that mine before the accident?

A. I couldn't say.

Q. Well, can you tell about how long?

A. Whenever we hit the bottom we sent coal up.

Q. How many months?

A. Probably four or five; three.

I believe there was a sidetrack leading into the mine on top. I think there were one or two flat cars run in by engines. Some coal was laid on those flat cars and taken away. I didn't pay any attention to the number of cars a day out of that mine before the accident. I had nothing to do with that.

The air shaft or escapement shaft would help at the west roadway, would draw air from that or purify the air in it up to this empty track. I couldn't say what the distance is from the escapement shaft to what I call the empty track. I don't know exactly how far the air shaft is from the main shaft. The main or principal shaft is between the air shaft and the end of what I call the empty track. I know that the escapement shaft would help out the west roadway because it was always—it was clear in there right along, and always a little would draw off, you know, with the head being opened out, and this end beside the steam pipe that was in the shaft. It is true there was gas in there all the time past this road past the empty track, and that we had to put in a fan to clear that roadway.

We found the body of Mr. Fulton that morning right here some place, I should judge about thirty or forty feet, twenty feet from the west end of the empty track. I found some gas in there before we had our fan at the point where this man was killed where it started to rise, but when this was opened out it was clear. The way we got it out of there, we brushed it at the time. We did not start our fan; the fan was not in at that time. After the fan was in we depended on that for getting it out, partly.

70 Q. Can you measure upon a map that has got a scale to it?

A. No, I could not.

Q. Will you measure the distance from the escapement shaft on this plat; there is an escapement shaft there which is round west of this east round way. Measure from here and tell the distance if you can. Can you scale it, twenty feet to the inch? Can you tell us now the distance after seeing the rule placed on the map?

A. Three hundred and some feet.

To which question and answer the defendant by its counsel then and there objected on the ground that the admission of this evidence for the purpose of showing the distance between the main and the air shaft was improper as not being counted upon in the declaration.

The Court: Of course this is limited to the purpose of showing whether there was ventilation.

Mr. Haley: That is all it is for in the world.

The COURT: And it will not be considered in any other way, gentlemen.

The distance from the pump house to the elevator and the shaft is sixty feet, I guess; something like that. The safety lamp was not in the pump house; it was in that road about half way; about twenty or thirty feet from the bottom, from the plate. It was kept hung on a timber; there was a nail in the timber and it hung on. It was not kept lighted all the time.

I said in my cross examination that a wrench was just as serviceable as a wheel for turning the valve upon the water pump. A wheel would stay on there all the time and be so fixed that you would find it there. The wrench was always there. It was not left attached to the faucet or plug.

71 In order to mine coal you have to keep all the time making roadways to open up.

Q. And the older a mine is, or the more you mine out of it, the greater amount of roads you have; is not that it ordinarily?

A. No, we generally fill in the old ones.

Q. Yes. Well, you have made them any way?

A. Yes.

Q. Now, you were asked about the difference between a long wall mine and a room and pillar. Are there any room and pillar mines in the Wilmington field?

A. I believe there are. I think the Cardiff that belongs to her district; I don't know.

Q. Whether you have a long wall mine or a room and pillar mine depends entirely upon the judgment of the man who opens the mine, whether he will have one or the other.

A. No, those small veins are long wall mines.

Q. A small vein is a long walled mine?

A. Generally work them that way; they all work them that way, the working along a small vein.

Q. Well, what is there to prevent the other kind of a mine? The pillar mine with a small vein as well as with a larger vein?

A. It would not pay them.

Q. It don't pay them. It is a matter of judgment in the mining.

A. I don't know how. We have stone to build in the small vein and there is none in the big vein. Therefore you could not work on the long wall system the big vein.

This coal mine is situated in Grundy County, in the State of Illinois. I knew Schmitz for a long time in his lifetime. He is now dead.

72 Recross-examination by Mr. SIDLEY:

The safety lamp was always left hanging on that bottom when it was not in use; that was its regular place. It was always ready for use. The taking out of that coal was merely incidental to our cutting the roadways. We were not in there mining coal in the regular sense of the word. We were cutting roads. Our object in that mine in working at that time was to cut roads. In the process of cutting roads we cut through some coal veins, also through some

rock and other stuff in the mine. Everything we cut through was taken out and sent up above.

Q. And is that the sense in which you mean you were mining at the time?

To which question the plaintiff objected as incompetent, irrelevant and immaterial; which objection the Court sustained; to which ruling of the Court in sustaining this objection the defendant by its counsel then and there duly excepted.

MINNIE FULTON, the plaintiff, produced as a witness in her own behalf, being first duly sworn, testified as follows:

Direct examination by Mr. HALEY:

My name is Minnie Fulton. I have lived in Coal City since I went there as a girl about thirteen or fourteen years old. I was married seventeen years ago in October, at Braidwood. My husband's name was Samuel Fulton. He died on Sunday morning, the 27th day of January, 1901, in the shaft. Mr. Fulton and I had five children; all of them are now living. Their names are Annie, Mary, Allie, Willie and Maggie. The oldest child must have been eleven past when my husband died. Her name is Annie. The youngest one was fourteen months old. There were two boys and three girls. My husband and I had a house and he lived with the
73 children and me, at Coal City. His business was track laying most of the time for years up to and before the time he died. He was working for the Wilmington Star Mining Company, and had been ever since I married him; I don't know how long before. About the time of his death he was earning different prices. When the miners were raised, my husband was raised, and when they were broke in wages, my man was broke in wages. I know he has had as high as $2.25, but it seems to me that it was $2.28 a day. I think when he died he was getting $2.25 if I ain't mistaken. I couldn't say how long a time he had been earning the wages that I have stated. I know he was getting the same price for quite awhile before his death. He always worked steady unless he was sick or so. He was sick very little. My husband supported me and the children. He was thirty-six years old at the time of his death. I last saw him on Sunday before he was killed about fifteen to twenty minutes after six. I next saw him about twelve o'clock. The mine where he worked was I guess a mile, if not more, from where we lived. I saw him in my house after he was killed.

On pay day at the mine after Mr. Fulton was paid he brought his money home and gave it to me, and I used it for paying my bills and things for the family.

JOSEPH HENDERSON, a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. DONAHUE:

My name is Joseph Henderson. I have lived at Coal City for nineteen years and three months. My business for several years past

has been mining. I remember about some difficulty and some men killed in mine 6. I was then County Inspector of Mines. I knew mine 6 of the Wilmington Star Mining Company. The day on which Mr. Fulton was killed was on Sunday, 27th of January,
74 1901. I had visited that mine before that time. I observed coal coming out of that mine four months before the 27th day of January, 1901. There were railroad tracks laid up to the mine and connected with the main line of the railroad. The shaft was in operation and I saw coal hoisted by regular hoisting engine from the bottom of the shaft and loaded onto railroad cars. I observed that four or five times; five or six times. My business called me to that shaft frequently. My duties as County Inspector—mining inspector.

Cross-examination by Mr. SIDLEY:

I don't know that I remember particular times that I visited that mine, four or five times prior to January 27th. I was appointed County Inspector September 10, 1900. The last time before January 27th that I saw coal taken out of the mine was about the 22nd or 23d of December.

The next time before that was in November. The other time was in October. I have not got the dates. I don't remember the dates. My report will show. I saw this coal on top. It was mine run coal. Some of it was lump and some slack. It was taken out of the west, the south, the north and the east parts of the mine. I was down in the mine, saw it pushed, and followed it up. I don't know that I followed it up the shaft where they were loading, but I saw it put on the cage and saw it sent up to the top. I don't know where it was taken from the mine. So far as each individual lump of coal was concerned, I could not tell what part of the mine; but I know they were taking out—they were taking coal out. I am not speaking about particular carloads.

Q. Taking coal, you say? Coming up to the 22nd of December, 1900, from what part of the mine was coal taken out?

A. Well, what was dumped on the top when I was there, I could not tell what part it was taken out from; what was on the
75 platform I could not tell.

Q. You do not know of your own knowledge what part of the mine that particular coal came from?

A. Decidedly not.

Q. You do not know what part of the mine any of this particular coal came from?

A. It was mined down there, but the particulars, probably, I don't know. I know that the coal was taken from that mine.

Q. You saw coal which had been taken from the bottom of that mine?

A. Yes, sir.

Q. That is all I understand you know of your own knowledge? that is right, is it not?

A. That is right; that is perfectly true.

Redirect examination by Mr. DONAHUE:

I saw coal excavated at the bottom of the mine while I was inspecting. Prior to the 27th day of January, 1901, there were about twenty-four or twenty-five men working in that mine, mine laborers and all. They worked two shifts part of the time—not all mining coal though.

Deposition of LEOPOLD SCHMITZ taken at his home in the Township of Braceville, County of Grundy, State of Illinois, near Coal City, before Joseph Vavrik, a Notary Public, in the case of Leopold Schmitz against Wilmington Star Mining Company, and read in this case on behalf of the plaintiff.

Direct examination read by Mr. Haley:

My full name is Leopold Schmitz. I am now forty-three years old and live in Braceville Township, Grundy County, Illinois about one mile and a half from the Santa Fe depot in Coal City. I have lived there about six years, and have been in this country
76 about fifteen years. I was born in Belgium. On January 17, 1901, I went to work as a laborer in shaft No. 6 for the Wilmington Star Mining Company. I worked nights. My manager or my boss was John Wilson.

"Q. Who hired you to go to work?"

To which question, and the reading of the same, and the answer thereto, defendant by its counsel then and there objected, on the ground that it was immaterial in this case who hired Schmitz to go to work.

The COURT: Objection overruled.

To which ruling of the Court defendant by its counsel then and there duly excepted.

"A. John Wilson."

(Reading of deposition continued.)

"I worked just eight nights for this Company; the last night I worked was on the 25th of January, on Friday. I didn't work the Saturday night following, and started to work again on Sunday morning, the day shift, at seven o'clock. I first started to carry rails and ties to make the switch. I got these at the shift on top. I went down in the shaft that morning about eight o'clock. I went down by myself with three long rails. I saw Mr. Wilson, the mine manager, on top before going to work that morning.

"Q. State whether or not you received any orders from Mr. Wilson before going to work that morning."

To which question and the reading of the same and the answer thereto, defendant by its counsel then and there objected on the ground that an order received by Schmitz from Wilson should not be introduced into this case.

The COURT: Repeat the question.

(Question re-read by Mr. Haley.)

77 The Court then overruled the objection of the defendant, to which overruling of the Court the defendant by its counsel then and there duly excepted.

"A. Yes.

"Q. State what orders you received that morning from Mr. Wilson.

"A. Wilson told me to steady the rails going down in the cage."

To which question and the answer thereto, and the reading of the same, the defendant by its counsel objected upon the ground that an order received by Schmitz from Wilson should not be introduced into this case; which objection the Court overruled, to which ruling of the Court the Defendant by its counsel then and there duly excepted.

(Reading of the deposition continued.)

"Wilson saw me when I went down in the cage. I knew who was the mine examiner or fire boss while I as employed at that shaft. I saw Edward Pierard, the examiner, that morning before I went to work. I saw him going down the shaft at seven o'clock this same Sunday morning. I saw the mine manager or mine boss go down in the mine that morning. He went down before me; I went down one cage following.

"Q. Do you know whether Wilson had been down the shaft before you that morning?

"A. Wilson didn't but — fire boss did.

"When I got down in the shaft that morning I took three rails out of the cage and rang the bell for the cage to go up. After I went down Mr. Wilson and Sam Fulton came down with two switch points. I knew Moses Capet. I saw him go down in the shaft that morning. He went down before me. At that time he pushed the car in the day time, cage man. I saw him at the bottom of the shaft that morning in the road straight south about 25 or 50 feet from the bottom of the shaft.

78 "Q. State whether or not you received any instructions from the mine manager Wilson at the bottom of the shaft that morning."

To which question and the reading of the same and the answer thereto, and to this line of testimony relating to instructions, defendant by its counsel then and there objected, on the ground that orders and instructions by Wilson to Schmitz should not be introduced in this case, there being nothing to show that Fulton was present or knew anything about them; and upon the further ground that there was nothing in the declaration which would render instructions by defendant to Schmitz competent in this case, and that this is a statutory proceeding based upon exact language and the provisions of the Statute, and there is nothing charged which makes admissible directions from this defendant to some third party. That they would not be admissible even if directions were given to Fulton, and certainly not even if given to a third party; which objection the Court overruled. To which ruling of the Court the defendant by its counsel then and there duly excepted.

(Reading of deposition continued.)

"I received instructions from the mine manager Wilson at the bottom of the shaft that morning. I went down straight south close to the fire box and Wilson hollered after me and told me to go and help Sam Fulton, help push that car on the west road and help Sam Fulton lay the switch.

"Q. Did you do as you were told by Mr. Wilson?

"A. Yes sir."

To which question and the reading of the same and the answer thereto the defendant by its counsel then and there made the same objection as last above set forth; which objection the Court
79 overruled; to which ruling of the Court defendant by its counsel then and there duly excepted.

(Reading of deposition continued.)

"When I started to help Wilson push the car, Mr. Wilson, the mine manager, was close by the little engine that ran the fan. There was no light at the bottom of the shaft that morning, and I had just my lamp to work with. Mr. Wilson took his light, and Fulton had one. These were pit lamps attached to the cap. Mr. Wilson was fifteen or twenty feet from me when I started to push the car with Sam Fulton. There was no wall or anything between me and Mr. Wilson. The space there at the bottom of the shaft or drive way is about sixteen feet wide. I did not measure. When Fulton and I started to push the car away, Wilson was close up to the little engine; right close to me when we pushed the car.

"Q. Now, Mr. Schmitz, on one place you state he was fifteen to twenty feet away, and in another you state he was close by you; now state just where you was when you and Mr. Fulton started to push the car.

"A. I had to push Wilson back with my hand so as — rails would not touch Mr. Wilson."

"We were going to push the car in the west road, but stopped to take the track layer's tools. I put the tools on the top of — car to take to the west road. Mr. Wilson was looking at me at that time. When I was pushing the car I was on the south side of it, and Sam Fulton was on the north side. Fulton and I pushed the car about fifteen or twenty feet the first time and then stopped to get the tools. Then I went right straight and pushed the car along the road to lay the switch. I pushed the car along to the point where the bottom switch would connect with the other track, but there was no
80 switch at the other point where there should be a switch. Then Sam said: "Schmitz, lay down, the gas is lighted." I felt round for a stone to block the car, and put my hand on my mouth to keep the gas out of my mouth, and then as I got the car blocked I just had time to lay down. By keeping the gas out of my mouth, I mean fire. The west entry was about six feet wide, and a little more than four feet high at that place. I can't tell how sudden this fire came upon me and Fulton at that time; came quickly, all at at once. I saw Sam Fulton lay down. He layed between the wall and car. I layed down on the center of the track four or five feet

back of the car. The track was about two and a half to three feet wide. The car was five feet long, two feet ten inches or three feet high above the track. I hadn't any warning before the fire struck me that morning. The first notice I had of this fire that morning was just when Sam told me. Sam said for me to lay down. He said it quick. It was all in light; gas was in fire; there was no noise. Sam Fulton got all smashed, got killed the same instant; the explosion killed him. I got thrown down with the fire; I was thrown over three pair of rails. These rails were very long.

"When I arrived at the shaft Sunday morning I saw Sam Fulton there on top. I helped him get rails and points of switches. Before going down I helped Fulton carry three long rails and one car of props to the top of the shaft. I saw Edward Pierard, the fire boss, and Moses Capet go down at seven o'clock.

"After I was thrown over three pair of rails by the explosion, I called for help. The fire boss came, Edward Pierard, boss John Wilson. Moses Capet came after. Sam Fulton was behind me when they came. I was laying down.

"When Mr. Wilson came down with Sam Fulton, Wilson the boss went to the pump room to turn on the steam, but a little valve to turn on the steam was broken, so Wilson had to use a monkey
81 wrench to turn on the steam. The same steam supplied both pump and fan. The steam came from the boiler room on top of the shaft. I saw Mr. Wilson start the fan with a wrench."

Cross-examination read by Mr. Sidley:

"While I was working with him, Pierard watched for gas, to see if gas — in the place, and if there was he would chase it away with a rag. I helped him. I never seen him use any means to get rid of the gas beside waving a rag. He started the fan about two hours before going in the mine. He only had a fan for west road, for the side that had gas. The gas in the mine was on the west road. I am talking about those eight nights I worked in the mine. I didn't work in the mine at all after the explosion. Pierard started the fan every one of those eight nights while I went around with him.

"When I went down into the shaft the morning of the explosion, the fire boss, Pierard, and Moses Capet were at the foot of the shaft. I was at the bottom, and Wilson and Fulton came down. I waited till Mr. Wilson turned on the steam. He couldn't do it; the valve was broken. He went up top to get a monkey wrench, turned the steam on the little engine which turns the fan. The valve was broken; they used a wrench. Edward Pierard used the monkey wrench, and that day the boss used it. Pierard used it for the night time. I saw him use it every night. There was just one valve in the pump room to turn the steam on to the engine. (Witness points to the place on the plat at the southeast corner of the portion marked 'pump room' opposite the words 'one and one-quarter globe valve,' etc.) This is the valve that I say was broken. There is the fan engine (pointing to the place marked 'vertical automatic engine'), and there is the fan (pointing to the place marked '30 inches Garden City fan'). The fan engine was run by steam from

the pump room. After Wilson came down with the monkey wrench Moses Capet helped him start the fan. Wilson just turned
82 the steam on the pump room, and Capet turned the fly wheel on the engine to make it go. I helped Capet. After the fan was started I went straight south road, Edward Pierce was working down there. Besides Pierard and me Moses Capet was working there too. When I went straight south I left the boss and Sam at the bottom of the shaft. That is, Wilson and Fulton. I went straight south to Pierard, and it was about ten minutes after that when Wilson called to me. When he called, he was close up to the fan engine. It was too far for me to see him. He was by the engine. When he called, I went to Wilson. Fulton was on the east side — the bottom of the shaft when I came to the bottom. Moses Capet was some place to the south road, some forty feet or something about that in from the bottom, sawing a 2x4. Pierard was on the first road south making a hole on side of wall to put that 2 x 4 in. When I left Pierard he was making those holes inside of the wall. When I came out to the bottom, Wilson was standing beside the fan engine, close to the engine. The car was on the plate.' I pushed the car fifteen or twenty feet west of the fan, something like that, to get the tools. When Wilson told me to help Fulton, he was greasing west of the engine. He told me to help Sam, nothing more.

"Dr. Brock came here to visit me on Monday after the explosion and asked me to give my testimony at that time as to how the explosion occurred. I gave it to him the best I could. I told Dr. Brock exactly how it happened. Everything that I told Dr. Brock was the truth. He wrote down on paper what I said. Squire Henderson asked me the questions. I forget who else was here beside Brock and Henderson, but it was the inspector of the mines. I don't know his name. I signed the writing after Dr. Brock made it; I made my cross, and that was all I did. Brock signed. I
83 couldn't say whether Henderson signed. The doctor said I had Bright's disease."

(Redirect examination read by Mr. Donahoe.)

"The doctor said my kidneys were affected. I have trouble with my urine. I don't know what Bright's disease is. Doctor told me I had it. Doctor said by my urine it was Bright's Disease.

"I saw Edward Pierard go down that morning before I did. In reference to examining the mine to see if gas was there, I did whatever the boss told me to do. I was not hired to look after the gas.

"Q. While you and Wilson and Fulton were at the bottom of the shaft before you pushed the car, did Wilson tell Fulton or you to wait until the gas was out?"

To which question and the reading of the same and the answer thereto, defendant by its counsel then and there objected, on the ground that it was not proper redirect examination, was leading, and for the further reason that it appeared from the reading of the following questions and answers that Wilson's direction was not given to Fulton, but was given to the witness Schmitz and is there-

fore immaterial in this case; and upon the further ground that there is no count in the declaration upon which the testimony of a command to Fulton to go into a dangerous part of the mine can be based, that there is no count charging this defendant with negligence for commanding him to go in, and that there is no provision in the Statute which would justify it. That direction to Fulton himself would not be competent for the reasons stated, and even to a greater extent directions to a third party, even if Mr. Fulton should have been shown to have heard them, could not be competent.

84 Which objection the Court overruled to which ruling of the Court defendant by its counsel then and there duly excepted.

"A. No.

"Q. What did Wilson say to Fulton?"

To which question and the reading thereof and of the answer thereto defendant by its counsel then and there objected on the ground that it was not proper redirect examination, that there was no proper foundation laid in the declaration for the introduction of specific commands of this character from the defendant's mine manager to Fulton, which they are leading up to, and which the question seeks to draw out. That the Statute warrants no such ground of recovery, and there is no count upon which a command to do an act of this character which led to his death is based. Which objection the Court overruled; to which ruling of the Court defendant by its counsel then and there duly excepted.

"A. Boss no tell to wait, but told to go.

"Q. State whether or not Wilson the boss said anything else to you and Fulton except to go.

—. ——.

"Q. What statement, if any, was made to Fulton by Wilson?"

To which questions and the reading of the same and the answers thereto, the defendant by its counsel then and there made the same objection as to the next preceding question; which objection the Court overruled; to which ruling of the Court the defendant by its counsel then and there duly excepted.

"A. Just tell me to go, that all."

85 (Reading of deposition continued.)

"I know how Pierard got the gas out before this Sunday morning. He had a sack or old coat to chase the gas away. About half an hour before the men went down in the shaft in the morning he chased the gas out from the faces, so that the men could go to work at seven o'clock.

"I didn't keep track of what work I did when I came back to Coal City, but I worked in shafts No. 4, 5, and 6 of Wilmington Star Mining Company. I dug coal there, had a room in those shafts."

Re-cross examination read by Mr. Sidley:

"On this Sunday morning I assisted Moses Capet to run the engine. I had to assist him to turn the wheel because it was too hard to turn.

The water in the cylinder made it hard to turn. The water in the cylinder came from the steam. As the steam gets cold it turns into water. When I was in the mine with Pierard, it is my job to do whatever Edward Pierard tells me to do. I helped Edward Pierard start the fly wheel every night. Every time the wheel was started there was water in the cylinder; that was what made it so hard. If the fireman put on the coal or would leave the door of the furnace open, the steam would not have its right strength, and there was water in it which collected in the cylinder. There was water in the cylinders on that Sunday morning. Wilson was in the pump room; did not see him turn on the valve. I saw him go, but did not see him turn it. Wilson went on top the cage to get monkey wrench came down right away with another one. Sometimes one man would start the wheel in the morning; lots of time two men. On Saturday night there was nobody working in the mine. Before I went down in the mine I was carrying three long rails, a car of props, and carried them close to the shaft. I found the props the other
86 side of the shaft, and carried them on my shoulder to the car. The car was at the side of the shaft all ready to push on the cage when the props were in. It was ten or twelve feet to the cage, I got the switch points on the other side of the shaft close to the props, on the south side of the shaft about forty feet away from it I carried the switch points close to the shaft, but did not put them on the car. I put them close to the car. It took me about three quarters of an hour to get the rails and the props and the switch points to the shaft. I took the rails down in my arms. Sam Fulton and Boss put car on, and he took it off at the bottom."

87 ALEX FULTON, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows.

Direct Examination by Mr. HALEY:

My name is Alex Fulton. I am a coal miner, and have lived at Coal City about twenty-four years. Samuel Fulton was my brother I saw him about two days before his death. I lived a mile and a half from mine No. 6 of the Wilmington Star Mining Company; something like that, I believe, I don't know. I have been over at the mine quite often. I never worked there before the accident. I was there six or eight weeks before the accident looking for work. I didn't get any work. I could take a place and room with three men in the room, and a man could not make his salt, so I didn't stay. I was around the mine; they were opening the mine up all around. I mean by opening—well, take in a new mine where they drive narrow work and put in a lot of rooms, and then they start and open all around. There was coal being mined. I don't know how many men were at work there; there was quite a few of them. After the coal was mined, they put it in a flat or box car, a railroad car. There was a track leading to the mine. I walked on the track to the mine. I saw the mine in operation as a mine six or eight months before the death of my brother. I saw coal being loaded onto flat cars from that mine five or six different occasions. When I

was down in the mine looking for work, I didn't observe how many men were there at work. I didn't pay any attention to it. I didn't pay any attention to it at any time. My brother was thirty-seven at the time of his death.

Cross-examination by Mr. SIDLEY:

Beside the coal being brought up from that mine, I have seen dirt and rock, I mean rock when I say dirt; it is mixed with dirt anyway. I saw it brought up on the cage. When I was in there, they were digging coal down in the mine No. 6. I was down looking for work. My brother was working there when I was down. That was six or eight weeks before his death. He was track laying all over, laying track in No. 6. I didn't follow him around the mine. I was only down that day, but I seen him that day taking in rails on the east side. I guess the coal was being taken out all around. I know they took it out east, north, west and south some. I have seen it hoisted and dumped. I saw the picks put into it in taking it out of the earth. I have seen this right in the west where the accident was. I saw it taken from the straight west six or eight weeks before the accident. The straight west was not in very far at that time. I call the place where the accident was the straight west. I could not tell you just how far it was in at that time; a couple of hundred feet. They were taking coal out of them there; that is sure.

88

Q. Had the straight west been cut in further than where you saw them taking coal, or did you see them taking coal at the straight west as it was then?

A. Yes.

Q. That is, they were at the end of the straight west at the time taking coal out. What else were they taking beside the coal?

A. They had to take rock.

Q. Rock and dirt? You know what narrow work is, don't you?

A. Yes.

Q. They were doing narrow work, weren't they?

A. Not then.

Q. What were they doing?

A. Getting opened up all around.

Q. Around what?

A. Opening out the mine around, opening out the places.

Q. For what purposes?

A. Well, they have got to do that to make a mine out of it, I guess.

89

Q. That is, they first have to open out the mine, the first thing in the bottom?

A. Drive the narrow work at first.

Q. And what was the purpose of driving that narrow work in opening out the mine at the bottom? Is it to get circulation around in the mine?

A. Yes.

Q. That is the purpose, is it, and in this sort of a mine they open it out in this way and do their narrow work so as to construct a pas-

sage way around to the shaft, Isn't that so? So that the air will go around the mine and give good circulation?

A. Yes, after they get it opened out.

Q. They were opening up at that time, were they, and in opening it up they were taking out rock and coal and anything they came to, and that stuff was being put on the cars and taken to the ground and hoisted. That is what you say, isn't it?

A. Yes.

The coal that I saw there, some of it was not in very good shape; it was blown out, and other was good. They took everything from the narrow work all out on top. They did not put rock in the cars, but on the dump. They got it out of the mine the same as they got the coal, on small cars. Where they were doing this narrow work and getting through the stone and coal and rock, they took that stuff and put it on the cars and run it along on little tracks and got it to the foot of the shaft, and then they hoisted it on top.

My brother was laying track at the time I was there, in the east, the day I was down there. I was in the west; he was not there; he was in the east or some other place. I was looking for work down there. I talked to Wilson, the boss, at the bottom. I never saw my brother in the west because I was not there any more up to just a year ago. I saw coal taken in the east; I was not all over the south. What I saw is what I have described already in getting the coal and the stone out of the mine.

90 Redirect examination by Mr. HALEY:

They do not mix the coal and earth and rock and put it all in the same cars. When they get rock, they load it in the cars by itself, that and the dirt. They don't mix coal with it. They load the coal in a car by itself. Some parts of that vein were three feet thick, and some parts were a little more with black jack, but that isn't coal. Both earth and rock have to be removed in any mine, no matter how long in operation. In the coal fields at Braidwood or Coal City they can take the coal out. They brush, that is, take down rock and build a road. They leave all the rock and dirt in the mine that they take out in brushing up the room. Sometimes if they have got too much they have to send it on top or some place; send it out to the bottom.

EDWARD HOUSDY, a witness produced on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. HALEY:

My name is Edward Housdy. I am a miner and have lived at Coal City twenty-seven or eight years. I have been a miner for twenty-five years, as near as I can recall. I have known of shaft No. 6 of the Wilmington Star Mining Company ever since they started to sink it. At the time they sunk that shaft I lived within three quarters of a mile. I never went over there at all only once at that time on one Sunday. I had been over there once before the death of Samuel Fulton. When I was there they were driving nar-

row work and opening it out. I don't know whether they were doing any mining or not. They were opening out the mine, driving narrower. I saw coal taken out. I was only over there one day, on a Sunday; a flat car pretty near loaded then. There was a side track laid into the mine. I stayed there that day probably about an hour. This Sunday was before his death. I did not go
91 down into the mine; I saw whatever there was from the top.

Cross-examination by Mr. SIDLEY:

Beside the coal that had been in the cars, I saw dirt on top up where they dumped the dirt out. There was dirt and rock there too on top. I never was down in this mine before Mr. Fulton's death. I suppose the coal I saw on top of the mine came from down below. It was supposed to come from down below.

Q. You did not see it come up?

A. No, they were hoisting that day, it was Sunday.

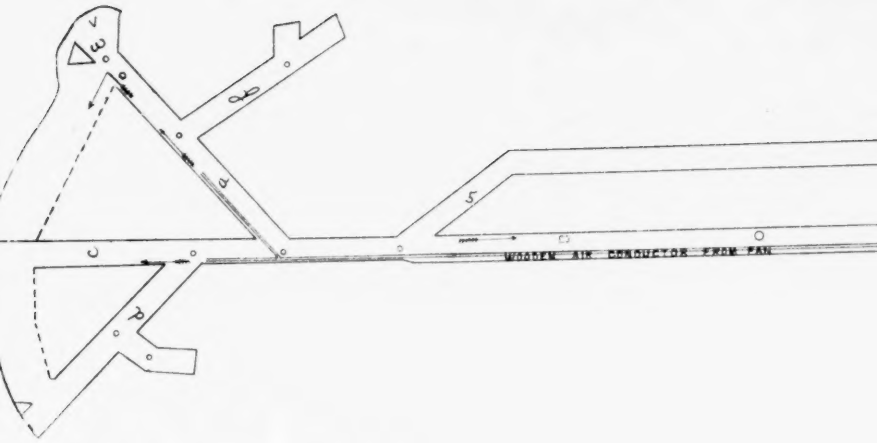
Q. You did not see it brought up?

A. That car was standing there pretty near loaded.

I don't know what part of the mine it came from; it was pretty small coal, fine coal, as though it had been shot out by blast.

The blue print, plat or map referred to in the examination of the foregoing witnesses was here introduced in evidence, and is as follows, being the same plat, map or blue print hereinafter referred to in the examination of defendant's witnesses.

(Here follows map marked page 92.)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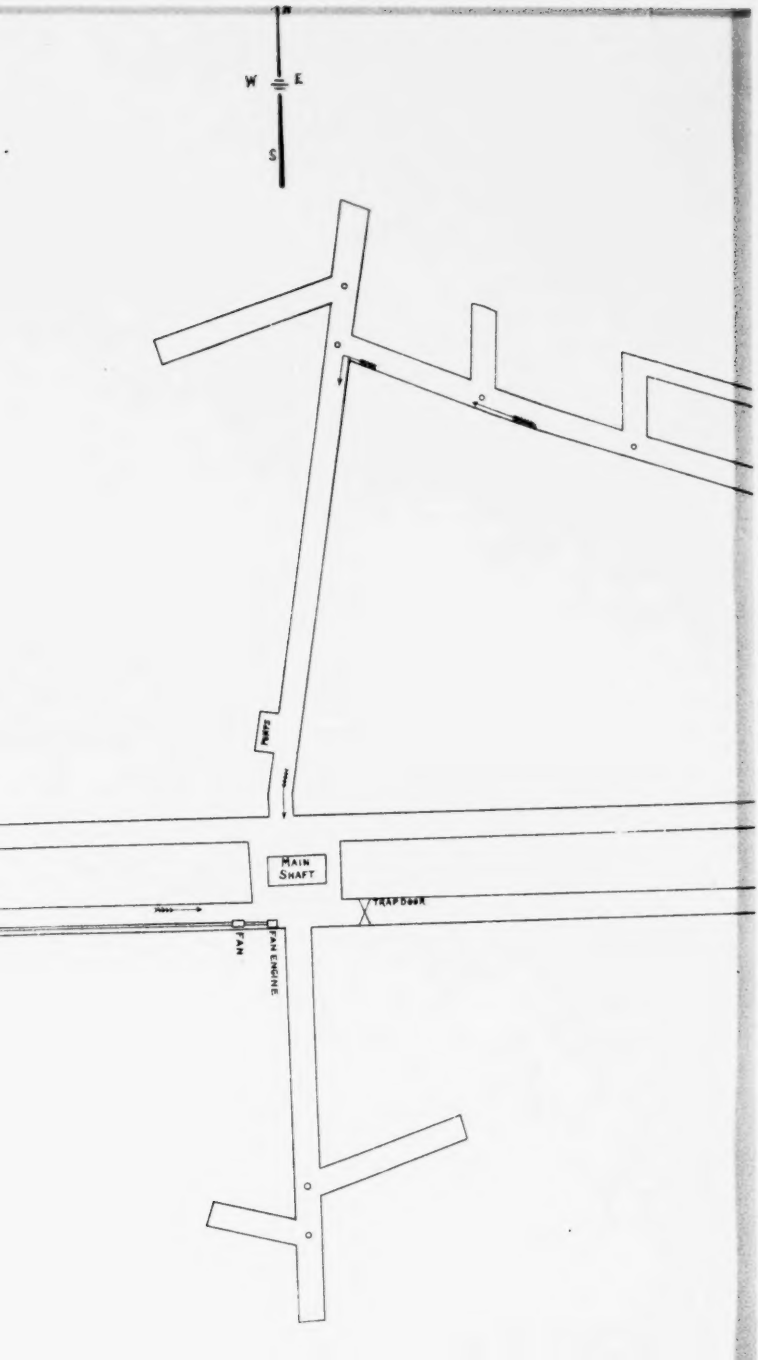
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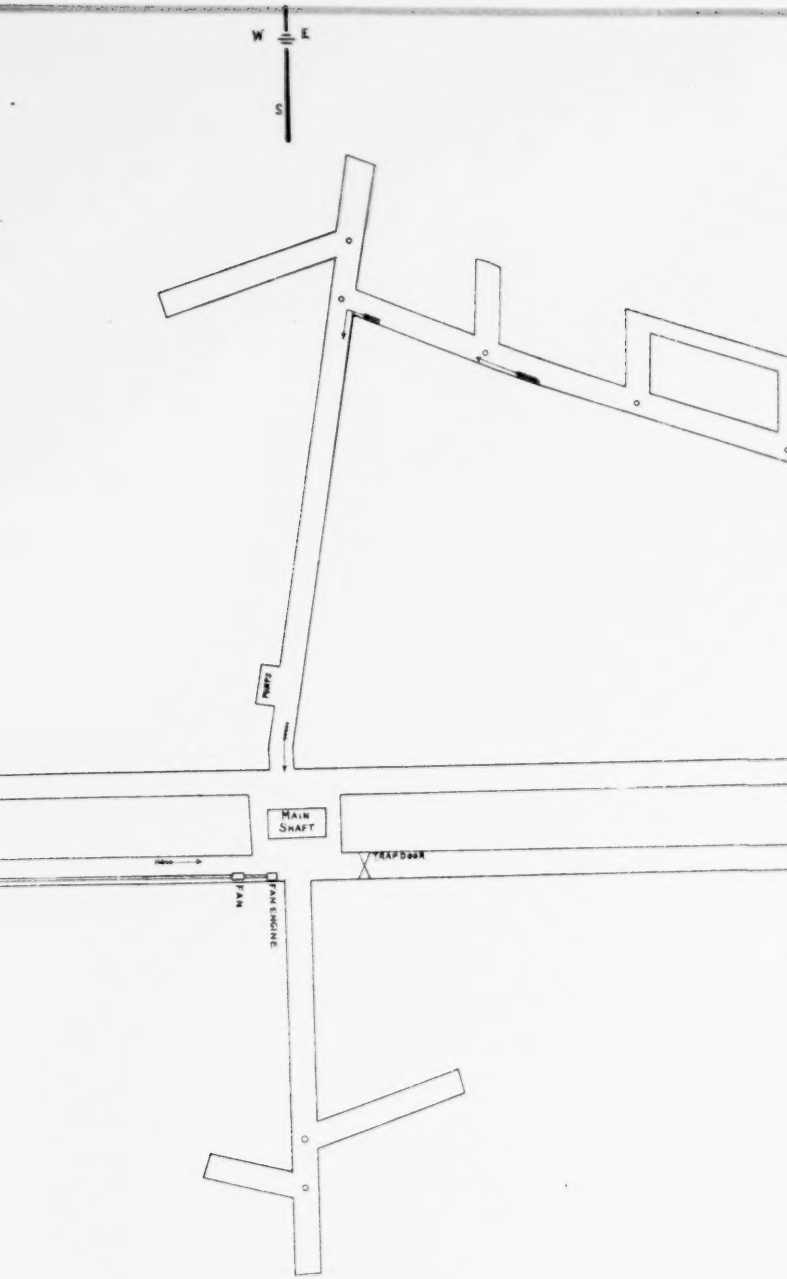
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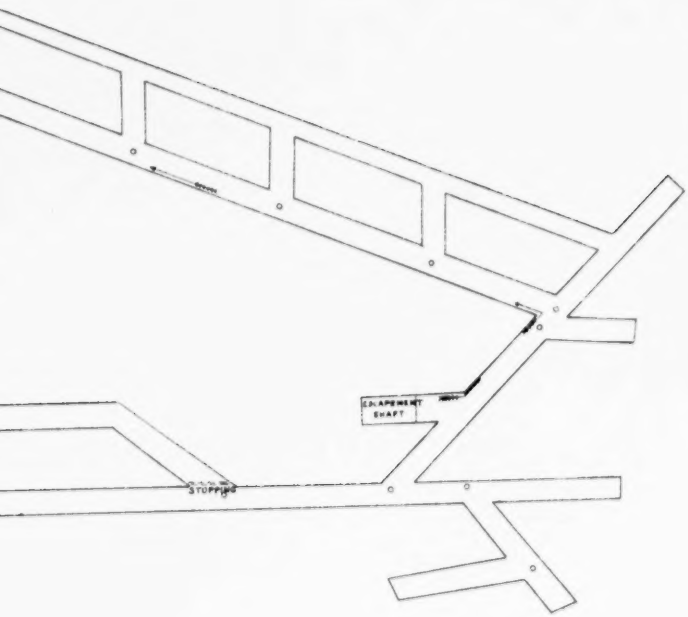

SCALE 20 FT. TO INCH.

No. 139.
N. S. M. Co. } fr. 92.
vs
G. Hem.

93 Plaintiff here rested her case.

Thereupon the defendant by its counsel moved to strike out counts 2 and 3 of the declaration, which relate to cross cuts and stoppings, on the ground that cross cuts and stoppings are not adapted or useful in long wall mines, but are only useful in other kind of mines, and are not required by the statute to be placed in long wall mines; which motion the Court overruled; to which ruling of the Court defendant by its counsel then and there duly excepted.

And counsel for the defendant then and there moved to strike out the fifth count of the declaration on the ground that the plaintiff in her case had directly negatived the allegation that Fulton was not in the mine at that time under the direction of the mine manager; which motion the Court overruled; to which ruling of the Court defendant by its counsel then and there duly excepted.

And the defendant by its counsel then and there moved to strike out the sixth count of the declaration based on the requirement and provision of the Statute contemplating an accident to the machinery, on the ground that the uncontradicted testimony is that the only defect in connection with this mining machinery was that there was a certain wheel absent from the valve regulating the steam, and that this wheel had never been there from the time it was put in. That there was nothing in the evidence to show that any air current was obstructed or stopped by this. That this was not such an accident as was intended by the statute. Which motion the Court overruled; to which ruling of the Court defendant by its counsel then and there duly excepted.

94 And thereupon the defendant, to maintain the issues upon its part introduced the following evidence:

JOHN WILSON, called as a witness on behalf of defendant, having been first duly sworn, testified as follows:

Direct examination by Mr. SIDLEY:

My name is John Wilson, and I have resided at Coal City in Grundy County in this State about twenty-six years. I am mine manager for the Wilmington Star Mining Company, and have been such manager since about the middle of the month of April, 1900. I was examined by the State Board of Mine Examiners to be a mine manager, and received a certificate from them to act as such mine manager. I have this certificate with me. (Witness here produces a document.)

Mr. SIDLEY: I desire to offer this certificate in evidence.

Mr. HALEY: Let's see it. Go ahead while I examine it.

I have been employed by the Wilmington Star Mining Company in the neighborhood of twenty-six years. While in their employ I have done all kinds of work in general in regards to a mine. I began helping to sink a mine in the first place. I have laid track; I have acted as pipe man, laying pipes, fitting up pipes; dumped coal, and

done everything in connection with the mine. In the month of January, 1901, I was acting in the capacity of mine manager for this Company at shaft No. 6, in which Mr. Fulton was killed. I had charge of the shaft and of the mine in the shaft. That was true of the day that Fulton was killed in the mine. I had charge of sending men into the mine, into this shaft. There was a mine examiner in that shaft, and he was under the direction of the mine manager, that is, under my direction. His duties as mine examiner were performed usually at night. The Superintendent of that mine
95 was Mr. William Campbell. He was my superior officer, and was not a mine examiner to my knowledge.

I remember the occasion of Mr. Fulton's death. I had known him, I guess, in the neighborhood of about twenty-eight years. I knew him before he came to Coal City, in Braidwell. He started to work in the mines before he left Braidwell. I couldn't tell just exactly when he came to Coal City, but I should think pretty much about the same time I did. While he was in Coal City, he was digging coal, several kinds of work, laying track, and Company work in general. He was working in connection with mines all the time. To my knowledge he had dug coal and laid track and worked on Company work in general, general repair work. I believe he worked nearly all the time for the Wilmington Star Mining Company for over twenty years. I would consider him a practical man, a practical, skilful miner. At and before the time of his death he was laying track in the mine. He was in charge of the track laying in the mine, and, practically speaking, he had laid all that had been laid in the mine at the time of his death. We began sinking this shaft No. 6 about in the month of April or May, 1900. Mr. Fulton had been working in that shaft before his death—I couldn't tell—for a month or so. He had been working, sinking, I don't know just the date when he began sinking. I couldn't swear to the month. I should judge about in the neighborhood of two or three months before that. At the time of Mr. Fulton's death the mine was not near completion at all. A circle had been completed in the east end of the shaft around toward the north, but around to the south the circle had not been completed. In the south, the west near the north; the circle was not completed in them. I mean by the "circle" the roadway. The roadway is an air way around the shaft, air passage. I would describe the work we were doing in the mine at and
96 shortly before Mr. Fulton's death as "narrow work;" turning the pillars. The general word in regard to how the work is described is the narrow work, turning the pillars. I mean by narrow work in the mine driving a road about six or six and a half feet wide, cutting it out, blasting out the coal, and driving it in to the neighborhood of six or six and one-half feet wide. We were not doing anything else in the mine at the time besides making roadways; could not do anything else, unless making the roadways. As I said, we were driving the narrow work; instead of mining the coal, they were cutting the coal in the center and blasting it out on both sides. They blasted the rock down too afterwards. The coal that we were taking out of the mine was not in very good condition, because it

was all shot to pieces. It was not in the condition in which we took coal out of the mine for commercial purposes, to sell. Coal for commercial purposes is worked in a breast, undermined. The condition of the coal for commercial purposes, in mining coal for commercial purposes, it is undercut, cut in under and then took down. As a general rule, when you work in long wall mine, when it is undercut, the coal breaks itself. Sometimes they use blasting to get it out when it don't break. We undercut is before we blast it. The coal when it comes out from undercutting is chunky; is in chunks, lumps, when it drops down; but the coal when you are driving a narrow is blasted out, and it is all shot and shivered, don't stand nothing, breaks all up in to slack. The coal that I speak of as being undercut for commercial purposes is not taken out of the roadways; it is taken out all around the circle, around the mine. The circle is not outside the roadway. That is next to the working faces when the mine is developed. The working faces are the difference between the narrow work and the work after the narrow work is finished, when the mine is developed, in the roadway, you have so much of the roadway, the wideness, and then you have so much on either side of the
97 road, and then you undercut that all along. We were not undercutting coal at the time this accident occurred to Fulton, and had not been before that time.

Q. I show you a plat which has been used by some of the witnesses, and ask you if you recognize that plat with reference to the mine in question.

A. Yes sir, I recognize the plat as the condition of the mine at the time of the accident. This west part of the mine was not near completion at all at the time of the accident. Before that Sunday and up to that time myself and the men under my charge were working in the west side of that mine putting this narrow work along here and extending the track and extending the work along here to carry the air to where the men were working. This short blue point at the north is straight north, the only work was at this point here; then that was not connected, and we started here to make a connection at this (indicating on the plat), and that was the condition at the time of the accident. They were being connected to make the circle around the shaft. It lacked from here to here, to make the connection from here to here, and making the connection here. Our purpose with reference to the men in the mine was with refere*nce* to making those connections. We were working on that work up to the time of the accident. The purpose of putting those air boxes along this place west here was to carry this air inside where the men were working so as to give them air and keep the gases out. With reference to the map, the face of the coal was here (indicating) at the end of the roadway. A fan was used at this time for the purpose of getting air out of the end of those boxes to the men. This fan was operated by an engine, and it was located here, and the fan about six feet or a little more ahead of the engine, from the engine to the fan. Prior to the accident, besides this fan there was ventilation in the mine, right from the air shaft here. The air shaft was

the down pass and the air circulated and came down here at
98 the bottom of the shaft. That was natural ventilation and did not affect this part of the mine at this time. The only effect it would have on the air on the west side of the mine would be to make it stronger. It would pull it quicker from the boxes on the return. Before the fan was put in here, the air came down to the bottom of the shaft, and we extended the boxes through and up the center, and it was worked by natural ventilation before we put the fan in. The condition of the air was good at the bottom of the shaft before the fan was there. I couldn't just exactly tell the date when the fan was put in the mine, probably in the neighborhood of six weeks or so before the accident took place; from a month to six weeks. I couldn't be certain for sure. I don't know when we began working in the west roadway in the mine, to extend the west roadway. I couldn't tell the date. We must have been working on the west roadway about two or three months before the accident. We proceeded with that west roadway, I believe, from 150 to 200 feet before we put the fan in. We found gas in the west roadway about 50 or 60 feet from the bottom of the shaft; then we found gas there right along from that time up to the time of the accident and after. We started to find the gas about 50 or 60 feet from the bottom of the shaft, and there was gas constantly all the time right along after that. Mr. Fulton had the laying of the track, track constructing of it in the west road right along, laid all the track in connection with the west road right from the bottom. Before he was killed he was working in the west roadway practically every day that he was at work, sometime in the day; not steadily, you know, but some time in the day he would be on the west road pretty nearly every day. He had been working in that west road pretty nearly right along all the
99 time, up to the time of his death. He was killed, I think, on Sunday, the 27th of January, 1901. That was not a regular working day in the shaft. We had been in the habit of working Sunday previous to that, repairing. The repairing work is something, some accident comes on, or construction work you can't do when the men are working. I should judge that we had in the neighborhood of 30 to 35 men working in the mine before Fulton's death. We had more than one shift, sometimes in the day shifts, and sometimes just two. We call a shift eight hours. The men had been cutting narrow work on these shifts. I think at the time of the accident there were about from ten to twelve men working in the west entry every day, that is, prior to the accident. The fan was working every day while they were in there.

Mr. Pierard, Mr. Capet, Mr. Schmitz and myself, and Mr. Fulton were in the mine on this Sunday when Mr. Fulton was killed. Mr. Fulton wanted to get some work ahead that he was behind. I had a conversation with him on Saturday afternoon in regards to coming to work on Sunday. That was the day before he was killed. The conversation took place in the mine; if I am not mistaken, I think it was on the east side, on Saturday afternoon. We was talking about the work in general and the work that had been done, and he had been idle some time previous to that, and he asked if it would

not be well for him to get out and get some of that work out, get worked ahead, that it was behind. I told him yes, it would be all right. That was sometime between two o'clock and half past three Saturday afternoon. The regular shift was working in the mine that Saturday and quit work at half past three. This was before the men quit work. The fan was working that afternoon in the mine. It stopped, I should judge, about in the neighborhood of four o'clock in the afternoon. I stopped it. Mr. Fulton was at the bottom of the shaft when the fan stopped, and we went up together
100 out of the shaft. I next saw Mr. Fulton Sunday morning. I should think it would be about between seven, half past seven, sometime near to half past seven; it might be twenty minutes after seven, from that to half past seven, I don't know the exact time. I saw him on top the shaft. I didn't have any conversation with him there. I assisted him a little in the work on the top. He was carrying props and things to work with, and I gave him a hand for to go down for it, and gave him a hand to take it down, some switch points and things he was taking down the shaft, and I gave him a hand and went down with him. When I got to the bottom of the shaft, I went to start up the fans. Mr. Fulton, Mr. Pierard, Mr. Capet and Mr. Schmitz were all around after I went down. Capet, Pierard and Schmitz were there on that Sunday morning because I had instructed them to come to work, to assist in putting in boxes for air, to extend the boxes to the work on the face of the road, the end of the road. When I got to the bottom I went down to start the fan, and I couldn't get a wrench to open up; I had lost that, and I turned and went straight up the shaft and opened the valve. When I first went down with Fulton Mr. Schmitz was in the bottom, and then Mr. Pierard and Mr. Capet came to the bottom. The five of us were at the bottom. When I went up on top they waited there till I came down. When I came down with the wrench I gave the valve a turn and opened the valve. The other four men came onto the bottom and some of them assisted to help start up the fan. Fulton was right at the fan when it was started, helping to start it, turning the wheel, I think. After the fan was started, Pierard and Capet and Schmitz went into the south road. This is the south road here (indicating). Pierard and Capet and Schmitz went into the south road, while I was right in the bottom here. Fulton and I was in the bottom here. I had some conversation with
101 Fulton at that time. Where Fulton was going to work, it was to the left of the straight west there, right in the straight west here (indicating). He was going to lay a switch right through at the point marked D. The conversation I had with Mr. Fulton was in regard to the directions of this roadway. They got off the bearing a little too much to the right, and I directed them to keep close to the left-hand side and keep it to the proper course. The track was laid past here (indicating), past the point marked D. Our conversation was in regard to the course of that road; I was telling him to put the track so as to get it back in its regular course, and after we had talked the matter over, he wanted to know if there *was* wasn't going to be somebody to help him. I said, "Yes, I will give you Smith." He said what was the matter he couldn't get Capet. I said

I thought Smith was all right for that kind of work. I told him there was no hurry, he was to wait and let the fan clear out, and then I would run up with the lamp and see if it was all right, a safety lamp, and see what it was like. "Oh," he said, "I know." I said I would run up with the safety lamp.

The COURT: Run up where, what do you mean by running up?

Q. What do you mean by running up?

A. Up into the south road, because it was all up hill.

Q. The south road, you mean?

A. The south road.

The WITNESS: No, the west road, up in here in the west road, go up here with the safety lamp and examine it before anybody could go in. "Of course," he told me, he said "I know."

Then I went into the south road; I went into the south road just directly after that. He was right about here when I said that to him (indicating). The car was sitting about at the time forninst where the fan engine was. He was near where the fan engine was down at the bottom of the shaft where the plate sheets is. When
102 I left he was resting on the pipes; resting on the car then when I came into the south road. I went in at the south road fourteen to twenty feet; I couldn't say exactly, somewhere in there from fourteen to twenty feet. When I got into the south road, I told Smith that he had to help Fulton to-day. Smith was in the south road, further south than where I was. Mr. Pierard and Mr. Capet were also in the south road. Mr. Pierard was about, I should say, probably 50 feet or so farther in. Smith was pretty close to where Pierard was. Capet was from fourteen to twenty feet in the south road, I think. I should judge from 14 to 20. I don't know the exact distance. Each of them had their miners' lamps with them. When I went into the south entry I started to measure the 2x4's that Mr. Capet was putting into the south rock to carry these boxes to see the length I wanted them cut. I should think I remained in the south entry from five to six minutes; of course I can't tell to a minute or two, either way, but I should judge it would be in the neighborhood of five or six minutes. When I called to Schmitz to help Fulton, Schmitz came out and walked past me right to the bottom. I didn't see him after that. My back was toward the bottom. I remained in that south entry, I should judge, in the neighborhood of five or six minutes. I next went out after the explosion of gas. Between the time that I went into the south entry and the time the explosion occurred I didn't go out to the bottom. I did not at any time that day in the mine direct Mr. Fulton to go into the west entry and west roadway. I did not at any time that day in the mine direct Mr. Schmitz to go into the west entry. The only instructions I gave Mr. Fulton that day in the mine was to wait. I did not give Mr. Schmitz any other directions that day in the mine beyond the directions I gave him when I called to him in the south entry. After the explosion occurred, so far as I was concerned, I was knocked down and put in the dark. My
103 light was out and my cap was off—and my lamp. I happened to have my vest on and I had some matches in my pocket. I put my hand in my pocket and pulled a match out and

struck the match and happened to look and I found the lamp, and by the time I found the lamp and got it lit I could hear someone holler. I ran in the west road. Pierard and Capet followed me in. I didn't go very far until I found Schmitz coming. He seemed to be coming on his hands and feet when I got to him. I asked Schmitz where Fulton was, and he said he didn't know. So I left Schmitz in charge of Pierard and Capet, and I went ahead, straight ahead for to find Fulton. I found him. I don't know just exactly how far in it was, I should think probably in the neighborhood of about ninety to a hundred feet, I couldn't say exactly. With reference to that plat, I should judge it was in around somewhere, I don't know just the distance; I would not swear to the distance. It was in the straight road. His car was probably in here somewhere (indicating). The west road at that point was inclined. The incline began pretty much about where I found Fulton. Just directly I didn't go in further at that point to examine the west entry. I next went in that same day. I found the air boxes all broken up and the track all out of shape right at this switch here (indicating); that switch on the road that is marked A to the northwest, and a little bit ahead of that switch there. Right from about here pretty near to the corner of the left hand road there, and then right here, about here the boxes and track were all broken up away back to about this holler here, right back along to the top of the shaft. I saw other evidences of explosion, pipes and things that were blown out on the track. They were lifted out of the car and scattered along the track. From my examination of the mine I think I could tell where the explosion had occurred. I should judge it occurred about here (indicating), from the point where the road A runs into the
104 west road. The object I have in my hand is a safety lamp. It is not the same as that referred to in my testimony, but one upon the same principle, but not just the same make. That one was longer up, not so wide here (indicating), and a little deeper. I spoke in my testimony of running up with a safety lamp into the west entry, before Mr. Fulton went in. There was a safety lamp in the mine at that time hanging on the north entry about 15 or 20 feet from the shaft. It was always hanging there when it was not in use. That was always where it was hanging, up on the timber there out of the way. It was ready for use always. When I came out to the south entry after the explosion the lamp was in the north entry hanging on the timber in the usual place. It was there when I went into the south end. It would take that fan that was in the mine at that time, I should judge, in the neighborhood of twenty minutes to clear out the west entry after it was started.

105 Cross-examination by Mr. HALEY:

My occupation now is mine manager in the employ of the Wilmington Star Mining Company. This is the same Company I was employed with in January, 1901, and the same mine. That mine has been running continuously since that time. Coal is ordinarily mined in that field by undercutting; powder is used sometimes, in a mine that is already opened up. I couldn't answer how many

car loads of coal had been taken out of that mine before January 27, 1901, because I don't know. I couldn't answer, either, what was done with the coal that was taken out of that mine. I know there was considerable burned at the bottom of the shaft of that mine. What was done with the remainder of it I couldn't tell. There was quite a little of it loaded on the ground. I believe there was some loaded in the cars. There was a side track not quite close against the mine, running betwixt the air shaft and the main shaft. There was no weighmaster there. The coal that we took out of the air shaft was running down the bucket, dumped out of the bucket into the car. I couldn't just exactly tell you the exact time when the shaft was sunk and mining commenced. It was in the fall of 1900 some time, I believe. The hoisting machinery and engines were there in the fall of 1900. In the day time there was about 35 men employed, I think. There was not quite so many on the night shift. I was at the mine in the day time, all day; sometimes two shifts came on during the day while I was there. I was not there sixteen hours a day, some worked from seven o'clock in the morning until three in the afternoon, some came on at three in the afternoon and worked until eleven, and sometimes some came on at eleven and worked until seven in the morning. I commenced at seven o'clock. I hired the men that worked in mine No. 6. They were not all working by the month.

Q. How many were working by the ton?

To which question defendant by its counsel then and there
106 objected, on the ground that it was not proper cross-examination. Which objection the Court overruled. To which ruling of the Court defendant by its counsel then and there duly excepted.

A. There was not any working by the ton at all.

Quite a lot of them were working by the yard, and the others working by the day. The purpose of making that cut up there to the northeast that is shown on the plat was for a main road to extend right through as far as the workings go. It was necessary to create ventilation for the air to come around. The air would come around in this first north drive way if it was completed, but when that was extended here then the connection was right along, and when you got to mining it in the working of the face farther back, you have got to keep increasing the main road, the main drive way. These white spots in here indicate coal. It was the intention to leave that coal there to support the shaft. This roadway here to the south extending beyond has two cross cuts or cross walks that was intended to accommodate further mining as we mined back. It would be necessary for circulation around the shaft. It was not necessary in this extending south. There was need of making that there. I should judge that coal had been taken out of this mine two or three months before the accident. I think there were two shifts working in the mine at the time of the acident. They would average 44 or 45 men, but not all at one time, probably a little more on the two shifts. The Wilmington Star Mining Company had other mines down there.

The mine examiner had charge of the mine at nights while he was there. He had charge of all the men that were at work. The second shift would stop work promptly about eleven to twelve o'clock. After the second shift had gone out the mine examiner and Mr. Schmitz would remain in the mine. Their duty there was
107 general work, and the mine examiner examined the mine before the men came to start work in the morning. I don't know just exactly how long before the men started work he examined it. I know it was reported to me before the men started to work in the mine; how long before that I can't tell. He reported to me that the mine was safe. I don't know how long before the men went down there he started the fan. The fan was always running in the morning when I started.

Q. When you went down to work, or let the men go down to work, the fan was running. Is that it?

A. Generally.

Q. Wasn't that always?

A. Eh?

Q. Wasn't that always the rule?

A. When the mine examiner was there, yes.

Q. Well, then he was there all the time, so far as you know, up to the time of this accident?

A. He was not there on a Saturday night.

Q. Well, the night before he was not there, no, but except Saturday nights he was there, wasn't he?

A. Saturday previous?

Q. Yes.

A. I think he was.

If the fan was stopped, then I started it. I started it on Sunday morning. I don't remember just exactly when I started it before that at any time; I have done it though, several times. I don't know just how long before. I recollect one time when the connecting rod of the engine broke, how long it took to clear the mine of gas after the fan was started. I kept track that time of the length of time that it took to clear the mine of gas. I just wanted to find out how long it took. It took something less than half an hour. I looked at the watch. It was about twenty minutes. I remember it was just about twenty minutes. I didn't make any memorandum of that. I don't remember the time of the day or night it was, exactly, that I started *to* fan, nor what time it was that I found
108 it was stopped. After it ran a certain length of time we went inside in the west road to hunt for gas. We didn't go into any other road, just into the west road. That was the road the fan was into.

Q. Was the fan in the west road?

A. Well, the boxes was.

Q. Would not the fan take care of any of the roadways?

A. It took care of the west road.

We had natural ventilation to take care of the south road and the north road. The natural ventilation for the north road, air has to come down the air shaft here (indicating). Right up here.

You come around here (indicating). The natural ventilation for the north road; the connection was made right around here, don't you see? The air came around the air shaft and came around here up the north road.

Q. Didn't the same thing exist for the west road if this is natural?

A. No natural ventilation along here; the boxes laid up into the south road.

Q. There were boxes in the west road?

A. There was a fan set here to take care of the west road.

Q. Were not there boxes in the west road?

A. That is what I am saying, the fan set here and boxes in the west road.

Q. Never mind the fan. There were boxes in the west road?

A. Yes.

There were no boxes in the east road, and none in the north road. The fan didn't help out the north road at all. The north road had just the ventilation that we see here upon the map, around here (indicating); this was the north road.

Q. What prevented ventilation around here up to the jointure of these two roadways at this point; that is, I mean now, speaking of the westerly road?

109 A. You can't take air in one road and back at the same road. You have no connections to go round and make the circle.

The natural ventilation from the air shaft right around here took care of the north road, and the same is true of the south road. It was not true of the west. There is no circulation in the south roadway, but the boxes are here. The air came from the air shaft in here up the main shaft. I mean the natural ventilation, put the doors in here and let the boxes through the doors, and the air coming through here forced the air into boxes here, and go back out in the roadway into the bottom of the main shaft. I have started the fan up myself when the mine examiner was there at the mine. I don't know that I ever did so except that Sunday morning. On that Sunday morning from past experience I knew that there was gas in the west roadway. I knew that was why the fan was put in; we all knew that. I knew those men were going there to work and were expecting to start in at seven o'clock in the morning. I didn't get there quite at seven. I permitted those men to go into the mine knowing there was gas in the west roadway. I don't know just exactly what time in the morning I got there. It was some time between seven and half past. I went down into the mine right after I got there. All I did on top was to help put on some rails that were there. Schmitz was on top when I got there, and I saw him go down. Capet and the mine examiner were not on top.

Q. How long before that Sunday morning did you know that the valve was off the fan?

A. I never knew that the valve was off the fan.

Q. Well, the wheel then that operated the valve?

A. Well, the wheel—there never was no wheel on the valve till the time I put it on.

110 Q. Was there a place to put a wheel on?

A. There was a stem where there had been a wheel on at one time; yes.

Q. What happened to that wheel?

A. I never seen it.

Q. How long had that been there in that place?

A. From the time it was put on.

Q. Well, how long was that? I don't know when you put it on.

A. Well, probably a month or thereabouts, or a little more; I couldn't just exactly tell.

Q. Did you make any effort to secure a wheel to put on that valve?

A. No I didn't think it was necessary.

Q. Was there another valve that operated that fan?

A. The valve that operated the fan was right close by the engine.

Q. What did that have on it, a wheel?

A. Yes, sir.

Q. Was that wheel stationary, so that it would stay there all the time?

A. The one at the engine?

Q. Yes.

A. The one at the engine?

Q. Yes.

A. Yes.

Q. And the one that let the steam on was stationary, and you could turn that whenever you wanted to?

A. Yes, sir.

Q. Well, now it was necessary that the other should be opened in order to let the condensed steam out, was it not?

A. That was the reason that the other valve was on. It was to stop condensation.

Q. That was to let the water out so the dry steam could get out of the engine?

A. To the engine.

Q. Now then, if there had been a wheel on there, of course it would be always serviceable, wouldn't it; the same as the other?

A. It was always serviceable.

Q. It was not serviceable that morning, was it?

A. Yes, sir.

Q. Were you able to operate it that morning?

A. I did operate it; I opened it.

111 Q. Did you find the appliance there to operate it?

A. Within a minute?

Q. I am asking you if it was there so that you could get it.

A. Not right there, but I got one inside of two minutes.

Q. What happened to the one that was there?

A. I don't know. I guess the vibration of the pump had made it fall off into the sump.

Q. A sump is a well?

A. A place to hold water.

Q. Do you know how long that had been off there.

A. I couldn't tell.
Q. Whose business was it to look after that?
A. I placed it on the night before and it was off in the morning.
Q. Did you turn it the night before?
A. Yes.
Q. And it was gone in the morning?
A. Yes.
Q. Where did you leave it?
A. I left it on the pump.
Q. And the vibration of the machinery threw it into the sump?
A. I don't know whether that was the cause or not, but I took it for granted that was what took place.

The machinery had been going pretty much all night the night before. The engineer kept the steam up to run the pumps. I left this thing there and I think it was shaken off in the morning when I got there. It was a monkey wrench. Then I had to go up on top and find another, and when I found the other and came down I was able to turn the valve and let the steam out. I would judge it was somewhere around about twenty to thirty minutes past seven when I started up the fan. It was not nearly eight o'clock. I should judge twenty minutes past seven. I did not look at any time. When I came down and got the monkey wrench the men were all around the bottom of the shaft clear down toward the pump room. There
112 was Fulton and Pierard and Capet and Schmitz. I didn't have any trouble in starting the valve. In starting the fan, I had to revolve the wheel a little. After I started the fan I was standing there having a conversation with Mr. Fulton. There was nobody else around there. Capet and Pierard and Schmitz were in the south road. Pierard was in I should judge from 50 to 60 feet. He was making a place in the solid stone to put the 2x4's in. I could see him picking. Capet was picking places to put in the 2x4's. I don't know if he was picking particularly at that time. He was cutting pieces of 2x4's to put in there where we picked the places for them. He was probably in the neighborhood of twenty to thirty feet north from Pierard, and about fourteen to twenty feet from me. I don't know just exactly how far, sixteen or twenty feet. Schmitz was up toward Pierard. I couldn't tell how close he was to him. He was not doing anything in particular the time that I seen him. He came to the mine to help to lift the boxes. Capet and Pierard knew what I wanted them for. I stood talking to Fulton probably in the neighborhood of five to ten minutes. I don't remember exactly every word that we said. I couldn't tell all that he said. I remember what we were talking about. We were talking about the direction of the road where he was going to work. To the left of the straight west. I was telling him it was not in its proper course, that it was bearing a little too much to the right, and I wanted him to keep the track to the left so that it would bring it back to its proper course. He answered aye, yes, or no, just as the occasion required. He said yes, it was all right. I was instructing him how it should be done, and he answered yes. After we had the conversation with regard to the direction of the road and where I wanted to put the track, he

wanted to know if he couldn't get somebody to help him. I told him yes, he could get Schmitz. He wanted to know if he
113 could not get Capet. I told him I thought Schmitz was qualified enough to help on anything that there was to do. Then I told him there was no hurry, but to take his time and let the fan clear it out, and I would go up with a safety lamp and see what it was like. He said "I know." He was to take his time and let the fan clear it up, and I would go up with the safety lamp and examine it and see what it was like. He told me he knowed. I think we were standing there in the neighborhood of five or ten minutes at that time, I couldn't be sure. Then I went in the south road and told Schmitz he was to help Fulton to-day. I didn't need to call; I could talk to him the same as I am talking to you and him hear me. I told Schmitz he was to help Fulton. I think that is the words I used as near as I can remember, that he was to work with Fulton, or help Fulton.

Q. Did you say to him, "You are to help Fulton?"

A. Yes, either to help Fulton or to work with Fulton. I won't swear which.

Schmitz said, "All right," and came out. He passed me where I was. I had no conversation with Schmitz except that.

Q. When you saw him start to go where Fulton was, knowing that the fan had not run long enough to get the gas out of there, why didn't you tell him not to go over there until the gas was fanned out?

A. I had already told Fulton. He was going to help Fulton.

Q. Why didn't you tell Schmitz?

A. Eh?

Q. Why didn't you tell Schmitz?

A. I didn't think it was necessary to tell Schmitz because I expected to be back there before either of them would go. I didn't intend either of them to go before I went.

114 Q. Why did you order Schmitz to help Fulton before you knew the gas was out of the west room?

A. They had tools to get and by the time they gathered them up I would be ready to go over there.

Q. If you intended the fan to clear up the gas and there should be no movement over there until the gas was out of there, why did you give that command to Schmitz to go and help Fulton?

A. Because I had already notified Fulton that he was not to go up there, and Schmitz was going for to help Fulton, assist Fulton, and there would be no necessity for Schmitz going there if Fulton hadn't been there. There would be no necessity for Schmitz going there if Fulton was not there, and I had already told Fulton not to go there, and I didn't think it was necessary to instruct him.

Q. Did you familiarize yourself with your duties as a mine manager?

A. Yes.

Q. Did you make yourself familiar with your duties as a mine manager?

A. I tried to as near as possible.

Q. Did you know that it was your duty to put a sign on that room——

A. Would it be necessary?

Q. I asked you if you know that that was any part of your duty.

To which question defendant by its counsel then and there objected, on the ground that the question of his duty is a statutory matter, and on the further ground that according to the statute it was not his duty. Which objection the Court overruled. To which overruling of the Court defendant by its counsel then and there duly excepted.

Q. Did you know or did you not know that it was your duty to put a sign upon that room stating that it was dangerous to go in
115 there if you knew there was gas there?

A. No, I did not think it was my duty that morning. I didn't think it would have been anybody's duty to do that. I know there was no sign put up. I believe that for failure to perform my duties I am liable for punishment. Fulton is dead. He was killed dead that morning. Schmitz is dead. I think it would have been about *about* five or six minutes after I went into that roadway until I was aware that there had been an explosion. Just the length of time I don't know. The first intimation that I had of the explosion was when I was knocked down. I should say I was about 220 or 230 feet from the place where I believe the explosion took place. The condition of the boxes and track there about the place leads me to believe that that was the place where the explosion occurred. There was greater injury done to the boxes and the track at that place than there was further down. That would indicate that there was a greater deposit of gas there to ignite than there is where all the gas was. The fire extended several hundred feet all through the ground there. If a box was not strong it would break, and if it was strong enough it would resist it.

When we got down about 50 or 60 feet in one of those driveways, we discovered gas was forming. That would take us down say the first three inches at a scale of twenty feet to the inch, somewhere along there, guessing at it. That would be I should judge about ninety feet from the place where we took them up. I never measured. Fulton was in front of the car; was not near the car at all. He was quite a deal south of that. I never measured. There was quite a distance between him and the car. I saw him when he was lying down there. The position I got him in you couldn't tell whether he was drove or knocked down right there at all. The position when
116 I got him I couldn't swear whether he was drove or whether he had been killed right there. I went in before Schmitz came out. I met Schmitz coming out. It must have been 30 or 40 feet from where I met Schmitz that I found Fulton. When I saw the car last before I went into the south drive, some props and switch rails were on it. The car was pointing west side, in the flat sheds. It wouldn't have to be turned around in order to start them out. The car was pointing west. It was probably about four or five feet off the run from the position where the car was seated. The props were not

quite so long as the car, and the rails were longer than the car. A switch point would be two or three feet longer than the car. The rails were various lengths, some of them twelve, some fourteen, some sixteen feet. These particular rails were twelve or fourteen feet. I couldn't swear to the exact length, somewhere about fourteen feet. There was no trouble getting in at all, because the car was facing west long ways, across the car. The width of the shaft, that is from the shaft back to what we term the bottom, was ten feet from one side to the bottom of the shaft. Here is the shaft here (indicating). That is the square. What I say, there is a shaft to the right of this side, that is at the bottom would be up to about ten feet back. The rails are over twenty feet from here, from this south road. The rails are ahead of the car. I mean bring the rails down the cage and take them off there and lay them on the side and push them onto the track and lay them — top of the track— They were on the track when I went into the south road. I didn't have any difficulty in getting around the end of these rails; the rails were fastened lengthwise to the car, didn't need swerving them round at all. They were on the car, and the car was four or five feet from the end of the rails extending back. The rails were lengthwise of the car. I don't know who started up the car. They were all taken into the west roadway. I saw the rails and props and points all there about
117 where the car was. The road would run from six to seven feet wide. About six feet high. It did not continue the same height all the way through. Some part was higher than others. It was not all even right along. The escapement shaft is about ten or twelve feet from the center here, I shoul l judge, and from the center it is a little farther one side than the other, according to the angle of the road. From center to center about twelve feet; I would not say for a foot or so. I don't know just exactly where that safety lamp that was hanging up near the pump is. We have had several new lamps since. I can't tell when last I seen it. This is the regular safety lamp. The lamp offered in evidence they call a Jenny lamp, I guess. The lamp we had hanging out there the time Mr. Fulton was killed was similar to that—similar in construction; the gauze was deeper and the glass shorter. We were using it steadily before Fulton was killed. I can't tell the last time I used it before that; it is the thing we are using steadily every day; I cannot tell the last time I used it personally. I saw it hanging up there that morning before the death of Mr. Fulton. I didn't have it in my hands; it was hanging in the timber where we always keep it when not in use. I didn't use it that day before the accident. I used it after the accident for the purpose of going up to see what damage had been done.

Redirect examination by Mr. SIDLEY:

I did not see Mr. Fulton and Mr. Schmitz start up the west entry. At that time I was in the south entry.

118 LAWRENCE CALLEGARO, called as a witness on the part of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. SIDLEY:

My name is Lawrence Callegaro. I am an Italian, and live at South Wilmington, Grundy County, Illinois. My business is keeping a saloon and store. I worked for the Wilmington Star Mining Company in 1901, on or before December, 1900. I remember being injured or burned while in their employment. That was on December 4th. I burned my face and hand. The place where I was burned was down the shaft in the west entry of mine No. 6. I was about twenty yards in, something like that, when I was burned. I went in there below with Angelo Bombario. He is dead now. He called me to go in. I was a little behind him. There was most of the gas about twenty feet further. There was an explosion at that time. The gas exploded. Angelo Bombario lighted it. I was behind; the explosion pulled me behind about six or seven yards. The gas was afire. He started the fire. He had a lamp with him.

Cross-examination.

By Mr. HALEY:

Bombario had a lamp, and he was ahead of me. I got a burn. This was on the 4th of December. I wrote it down. I remember the time because it was Santa Barbara's Day, and the people mostly didn't go to work; they stayed out the day before and the day after that, going in about eleven o'clock.

CHARLES BROMLEY, called as a witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. SIDLEY:

My name is Charles Bromley. I live at Coal City, and am a hoisting engineer with the Wilmington Star Mining Company. I received a certificate as engineer from the State Board nine
119 years ago. I have been with the Wilmington Star Mining Company, I suppose, nine years. I was acquainted with Samuel Fulton in his lifetime. I remember having a conversation with Samuel Fulton prior to the 27th day of January, 1901, with reference to the gas in the west roadway of shaft No. 6 where he was killed. That conversation took place in the boiler house, in the boiler room of No. 6. That is right at the top of the shaft. It took place the Sunday previous to the time he was killed. He had not been working for three or four days previous to this, and he said he had been sick, and he being laid up got us to talking about Callegary who had been burned. I asked him about Callegary; I mean Callegaro, the man on the stand yesterday. He said that it would be a

good thing if a few more of the dagoes got burned; they would learn something. After that he stated that he had been in the same road 'Gary got burned; he had got to probably a hundred feet farther than where 'Gary was burned and bailed water out, and he hadn't put off the gas. I had another conversation with Mr. Fulton prior to the 27th day of January, 1901, with reference to the existence of gas in the mine. I can't tell exactly when it took place. I should judge probably six weeks, may be two months before; at the bottom of the air shaft. He asked me to go into the straight road, and I refused to go in. He asked me to go in, but I didn't want to go in. Well, I said, "No, you go in." He asked me if I was afraid, and I said I was afraid, there was a little gas in the road. He asked me if I would like to see him put the gas off, and I told him—— Following this conversation he took a miner's scraper and put his miner's lamp on the end of it. A scraper is what they clean out the hole with. The lamp was lighted. He bent down, laid himself down so that he could hold on, and held the lamp up to the roof until he lighted the gas.

I was at mine No. 6 on the date that Fulton was killed. I had been at that mine ever since they started to sink it in 1900; I
120 don't know exactly what month, probably May. The scales had not been put in at the top of the mine at the time of Fulton's death. There were no screens there for screening coal. There was just one track there at that time, going in from the J,—the switch from the J track; going in from the switch what we brought our machinery in on. As to my experience in and about a mine, I hoisted coal two or three years. I know how coal ought to look in the market, and what plans or facilities are customary around coal mines where coal is being mined for the market. It is customary to have scales in such mines. They are situated at the end of the screens. This would be customary at the time of Fulton's death to produce marketable coal. I think it would be customary at that time to have screens at the top of the mine if they wanted to produce marketable coal. Beside this, I should judge a fan on top, a larger fan, was customary about a mine where coal is being mined for the market; to operate a mine where there is a large number of men.

Cross-examination.

By Mr. Haley:

I have dug some coal, but not a great amount. I was quite a boy when I was mining coal. I cannot tell how many years since then, because I don't know. I don't know just how many months we were engaged in raising coal from the Wilmington shaft before January 27, 1901. That is the best answer I can make to that. I don't know. I was not a witness before the Coroner's inquest. I first told somebody about this conversation I had with Mr. Fulton right after the accident, but I don't know just when. I told it to Mr. Wilson; I don't think I told it to anybody else without it was told to my wife. I don't remember telling it to my wife, but I would tell her lots of

things I would not tell other people. I did not tell Dr. Buchanan. I have not been at the offices of the Company's lawyers here
121 in Chicago. I was at the offices of the Company here in Chicago. I never saw their lawyers *to* this morning or yesterday when I got into court. I didn't have any conversation with them as to what I would testify to, nor with Mr. Buchanan. I told Mr. Wilson right after the accident. I don't think I had a talk with him yesterday. I have never made a written statement to anybody as to the conversation I had with Mr. Fulton. I never wrote it down or made any memorandum of it at all. Before we came up, Mr. Campbell asked me if this conversation was true that Wilson said about. I told him it; told him as near as I could. I told Campbell of it before the suit. I didn't tell anyone except Wilson previous to this time.

Q. I asked you if you did not tell this jury that you did not tell anyone but Wilson what this conversation was. Wasn't that positively your words?

A. Yes.

Q. Did you say that?

A. Yes, sir.

Q. Was that true?

A. Well, I remember now, I spoke to Mr. Campbell.

I forget things sometimes. I didn't forget this conversation. That stopped in my mind all the time. This conversation that I have told the jury about took place in the boiler room. There were two other engineers of the mine beside me. I got on at eight in the morning and quit at four in the afternoon; changed again at four and twelve at night, eight hours each. I remember the day Fulton was killed, the day of the month was 27th, and the year 1901. The time I talked to him was just a week before, on the Sunday before. He was at work below, and came up to eat his dinner. Capet was in the engine room eating his dinner, and Sam and I were the only ones in the boiler room. The engine room was sixty feet from where we was, I suppose, round about there. This conversation came around by my commencing to talk about 'Gary who got
122 burned. Sam opened the conversation first about his being sick. He told me about being laid off; I asked him why he wasn't working, and he said he had been s I asked him about 'Gary, and he said he didn't think 'Gary as working after he had got burned. I don't know when it was that 'Gary got burned; I can't tell you how long before; it must have been all of a month; I would not answer that question definitely. I asked him if 'Gary was working yet; he said he didn't think he was. I didn't know as much about 'Gary as Fulton did. I operated the hoisting machinery. It was probably seventy feet from the cage to where he worked. I asked him if 'Gary was working, and he said "No." He thought it was a pity a few more dago — didn't get burned. That is what they call them down there. It is not a common expression of us people down there to speak of others in that way. He didn't tell me he had any trouble or difficulty with 'Gary. I can't see why he called him such a vile name as that if he didn't have any difficulty;

I didn't understand why. He didn't appear to be angry. He was talking just as you and I are talking now, and called him that name. I didn't get angry about it when I heard workmen called a name like that—wasn't calling it to me. I didn't say anything in reply. As far as I know the conversation ended there. The next talk I had with him was the Sunday morning he was killed. I talked with him through the pipe—through the tube we talked through to the lower landing. The Sunday morning we were talking about a little while ago was the Sunday morning previous to the time when he was killed. I said that I had some conversation with him in the bottom of the mine quite a while before. I cannot tell definite time; I should judge six weeks. It was in the day time. I was down there looking at the pump. The large engine was not in use. I was operating an engine at the air shaft at this time. The large hoisting engine was put on, I don't know, exactly, but it was long after, one year, I think. Before that engine was put in there was a
123 small friction engine to hoist buckets up and down. I was not there running that friction engine when I was down there. I was at the air shaft at this time when I went down. I was connected with No. 6, but there were two shafts. One shaft was down and another engineer were pulling up buckets. That engineer's name was John Weekly. I was engineer at the air shaft. There was an engine and equipment there. There was no one looking after my engine at the air shaft while I was down there talking to Mr. Fulton. It was not in use that day. I went down the stairway to look at the pump. My engine was not going to run that day, and I went down to see the pump at the bottom of the hoisting shaft. I had no concern with that pump except to see it working. There was another man there. He never went away from his engine. There was no report that the pump was out of order. I went down occasionally when I was not busy. I was the hoisting engineer, and I went down to look at it now and again to see if it needed fixing. I saw Fulton at the bottom of the air shaft. I saw someone else; I can't mention the name—Frenchman was with him. I can't tell where the Frenchman is now. I have probably not seen him since the mine was sunk; pretty soon after that. I do not know his name. I had met him before. I have no idea where he lives now—where he may be found. When we had this conversation Fulton and I were right at the bottom of the air shaft. He was working alone laying a switch. The Frenchman was working at the fix. Fulton told me about going into the straight place, the place right past where he was laying the switch. I can't tell you the direction that would be in from the hoisting shaft, because I have no map or anything; don't understand the map on the ground at all. I was familiar with getting one line there. It was the first left-hand road, I think, being the east road. I was right there at the bottom of the air shaft, and probably the straight way where he wanted to
124 go in would not be over 25 feet may be, in that neighborhood, as near as I can judge, from the air shaft. The air shaft is east from the hoisting shaft, I think. I stayed down and took a little wind, five minutes, in that neighborhood. After I got up I

watched him light that gas. I went there to the bottom of the other shaft, the hoisting shaft that is now. I went alone; Fulton went back to his work, I suppose; I didn't pay any attention to him. The gas I saw him stop off was in the first left-hand road off the straight east. That would not be either in the north or south road. The road turning direct may be 45—I don't know the degrees. Where this gas was would not be over fifty feet from the air shaft. I don't know the degrees they laid their road, if any, but it was the first left-hand road, fifty feet from the air shaft. As to what we said, why I just stayed down and he asked me to go into the road and have a look at the coal. I refused to go in because I knew there was gas in there within fifty feet of the air shaft, and the air shaft open. It was just a narrow road. It was within fifty feet of the air shaft and an open shaft, and yet I was afraid there was gas there, and refused to go in. He insisted on my going in, and I would not. I suppose he wanted to see this hair back of my head roll up a little; I don't know what it was. He didn't have anything against me. He wanted to make my back hair like the front. I don't know what it was. There was not enough to burn. I know this because I saw him light it, and I know there was not. Before I saw him light it, I had heard that there was a little and I didn't know the quantity. I think the sole purpose for inviting me to go in there was to get me burned. He never had anything against me before that I know of. He and I were friends, and I think that was one way of showing his friendship. I said I would not go in, and I stuck to it. Finally he went in. He had his pit lamp on the miner's scraper. The miner's scraper was a long iron thing, bent at the end, flat-
125 tened at the end to pull dirt out of the hole. It is a handle itself; it is all along. They have them all lengths. I should judge this particular one was four feet long. He hung a lamp on it. I don't think there was much gas there. I knew there was more than I wanted. I stood near that switch, about 25 feet, as near as I could judge from the place where he had that light at the end of the iron or scraper. If there had been any amount of gas it would not be a safe place. It would most likely kill me if there would be a large deposit. I didn't know if there was a large or small deposit. Every one working there knew there was gas in that road. I don't know anything about this mine damp or anything of that down there; I am not a practical miner. When I was a kid (I mined coal), but that does not enable me to be a practical miner. I have rather forgotten about mining. I don't know anything about gas. I did know there was gas there within 25 feet, and that some man would go there with a scraper and lamp and set it afire. He didn't make any noise at all. The indications that anything had occurred was just a kind of a flash; some little flash. I don't know what his intentions were in going in there and shooting that gas off. I don't know whether he had any sort of business there. He was not laying any track there. He was laying track in that first switch. I don't know whether he had any business, whether he would have to go in there afterwards or not; I don't know. He didn't tell me it was any part of his business to look after the gas in

that room. He went in there and put a lamp on the end of that scraper and carried fire there, as near as I know, to let me see it go off. Whether he had other business or not I don't know. I should judge that gas is a dangerous thing in a mine if it takes fire; and knowing of that danger I say that without any sort of reason that I know of he went in there and purposely set it afire. I am
126 still working for the coal company, and am engineer at that mine. I have been at work for them nine years. I can see this principal or main shaft (indicating on the plat). I was running the engine at this air shaft at that time. Fulton was laying track for the shaft at this place right here (indicating). I suppose it would be south or northeast from the air shaft, according to that. He went up into this road to set off the gas back here (indicating) northeast in this road here (indicating). I didn't measure it. I said about fifty feet from the shaft. There was no obstruction that I know of between the air shaft and the place where this gas was found that I say he lighted. The air shaft was open clear from the bottom to the top without any obstruction of any kind.

Redirect examination.

By Mr. Sidley:

It was in this road here that he lighted the gas (indicating), up that northeast road, as near as I could judge, about 50 feet from the shaft. They were just starting this one. There was nothing else there; they were cutting this road. There was a switch road there. The gas he set off was in the northeast road in the straight road; in the one going straight up northeast. That is the one he was in, that northeast road up there (indicating); it was in there (indicating). They were starting this one up. The west had been cut in just about a foot; I can't say. The one shown east was not cut at all at that time. There was nothing else but this one straight road. As to how far that straight road ran beyond the place where they had taken a switch, I guess at it; I judge about 25 feet. The gas in that northeast road was right at the face, right up against the coal at the end of the road. There was no opening in that roadway out from it except the one going out where I was.

I desire to correct my statement in cross-examination in reference to the conversation between Mr. Fulton and me. I asked
127 him about the reason he was not working. He had been laid off; he said he had been sick; and then I asked him, I said: "Has Callegary started work yet or not?" And he said it was a pity a few more of the dagoes —— —— did not get burned; it would learn them some sense. He said he went in there probably a hundred feet, he said, on the same morning Callegary got burned, and didn't put the gas off either. He went in with his lamp just the same and bailed water out of there. He didn't state particularly as to how he went in.

Recross-examination.

By Mr. HALEY:

Mr. Fulton didn't tell me when it was he went into that room. He said just before Callegary got burned. He said it was on the same day—same morning Callegary was burned. I remember now that he said it was the same morning Callegary was burned. He said he probably went a hundred feet farther than 'Gary. He said it was the same road 'Gary was burned. He did not exactly name the direction of the road, but he said he went in the same road that 'Gary was burned in. In reply to that, leading down to that name that he called 'Gary, he said that it was a pity that a few more of them didn't get burned; it would learn them something. He said that he went in there, right ahead of 'Gary before he got burned, and bailed water out, probably a hundred feet farther, and he didn't put the gas out. That is just as near as I know the words he said, and all I recollect about it.

Q. What did he say about having his lamp on him when he went in?

A. He had his lamp.

Q. What did he say about his lamp; did he say he had his lamp?

A. No, sir, he didn't.

Q. Did you say a little while ago—what you said was he went in with his lamp?

A. He couldn't put it off.

Q. I ask you what you said. Didn't you tell the jury he
128 went in with his lamp a hundred feet or so and bailed water out?

A. I am not sure.

Q. Do you remember whether you said it or not?

A. That he told me that he had his lamp?

Q. Do you remember you made that statement within less than two or three minutes?

A. No, I don't know I made that statement.

Q. I ask you if you remember; you say you don't. What is your recollection about your saying he had his lamp?

A. I said he must have went in with his lamp. He said he didn't put it off, so he must have had his lamp; that is the point of that.

Q. Did you say he went in there with his lamp a hundred feet and bailed water out before 'Gary was hurt?

A. I don't think I said he said it; he told me he went in and he said he didn't put the gas out.

Q. Did you say he went in with his lamp?

A. I don't know.

Q. Do you remember?

A. I don't think I said it.

Q. I ask you if you remember or not; I ask you if you remember?

A. I tell you I don't think I did.

I left these things that I now state to Mr. Sidley out when you examined me, because you went a little too fast, I guess. If you go a little slower, I can remember; I think you are a little fast.

129 MOSES CAPET, a witness produced in behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. SIDLEY:

My name is Moses Capet. I reside at Coal City, Grundy County, Illinois, and am a miner employed by the Wilmington Star Mining Company. I have been engaged in mining altogether about twenty-seven years. I have done all kinds of mining work, digging coal, sinking shafts, and timber man, and do everything. I knew Samuel Fulton in his lifetime. I have known him a few years, I guess. I worked with him in No. 6. He worked on the second shaft, and I worked on the main shaft when I was sinking. I was in the employ of the Wilmington Star Mining Company when Mr. Fulton was killed in January, 1901. I had been working for the Company about a couple of years. I don't know how long Mr. Fulton had been working in that shaft No. 6 where he was killed; may be six months. I am not sure. He stopped on the second shaft, on the air shaft. He lay track in the main shaft. He had been working in that shaft No. 6 about six months before he was killed. He sunk the air shaft, and then he laid track in No. 6. He had laid track in all the main roads. I worked with him sometimes in that mine before he was killed. I had worked with him in the west roadway in that mine before he was killed. I don't know how long before the accident. Three or four or five or six times before the accident. I don't know for sure. I had worked in the west roadway with him before the fan was put in, and had worked with him in that west roadway when he was going in there. Mr. — and Sam Fulton brushed the gas away from the roadway. We were brushing gas out of that west roadway. I don't know the day he was killed. I know it was in January. It was on a Sunday. I was at the mine that day when he was killed. I was there to put up an air box, to put up air boxes for air, me and Ed Pierard. Johnnie Wilson, the mine man-
130 ager, told me to go there that day. At the mine were five men, me, Ed Pierard, Sam Fulton, Paul Schmidt and Johnnie Wilson, five. When we went down in the shaft, we started to work. Ed Pierard went down in the mine with me. When I went down in the mine I stopped to dig some holes and get some pieces of board on the side to make place for the air boxes. I started to get some 2x4's to fix the air boxes in the south roadway, from the bottom. Me and Ed Pierard go down in the mine first, and the other fellows go down after them. I don't know for sure how long. I had no watch. I don't keep time. When they came down we looked for to start the fan; Johnnie Wilson, me, Ed Pierard, Sam and Schmidt helped start the fan. After the fan was started I went back to the same road again, south. I went back right away after I oiled the fan, and got good start. Pierard went 25 or 30 feet farther than me in the south roadway. Schmidt went with Ed Pierard in the south road. They were there when I came in. When I went in Fulton was on the plate at the bottom of the shaft. Wilson was on the bottom, too, on the south side of the shaft, across by the fan engine.

After I went into the south roadway, leaving Fulton and Wilson out on the plate, I got some 2 by 4's to put in the holes to bear the air boxes. I got the 2x4's on the bottom. I went out to the bottom again after I had got in, and I got the 2x4's right in the hind end, in the end plate where the south roadway comes out to the plate. When I went out to get that 2x4, I was close by Mr. Wilson and Mr. Fulton. I heard only a couple of words said at that time. Wilson said the words to Sam Fulton. The words were, "Here, take a time."

Q. What is that?

A. "Take a time."

I took my 2x4's and go back to the same place. I didn't hear any further conversation then. When I went back with my 2x4's,
Wilson was right on the bottom with Sam Fulton. He was
131 in the south entry afterwards. He came in may be a couple
of minutes after that conversation; I don't know how long. I was in the south entry about fifteen feet from the bottom, cutting some 2x4's. I was going to put these in the side to hold the boxes up, on the left-hand side which stretches out. That is, on the east. When Wilson came in, he hold that 2x4 piece while I cut it. He hollered to Schmidt. I don't know what he say to Schmidt; told him to help Sam Fulton. When he hollered to him, Schmidt was about 25 feet farther south in the south roadway with Ed Pierard, and when Wilson called him, Schmidt passed by us and went to the bottom. Wilson stayed there with him. I don't know for sure whether he go to the bottom or not. When Wilson called Schmidt, Schmidt was working with Ed Pierard. After Wilson called him, Schmidt go to the bottom.

Q. What did Wilson do?

A. That is before Wilson came to me. That is before, when he called Paul Schmidt.

Q. Where was Wilson when he called Schmidt?

A. He is there on the bottom, and he come after Schmidt go past there; understand?

Q. Well, I don't quite understand, no.

A. He hollered Paul Schmidt to come. Paul Schmidt come by me.

Q. Who was on the bottom?

A. Wilson.

Q. Wilson was on the bottom?

A. And Sam Fulton.

Q. And Sam Fulton?

A. Yes.

Q. And then he called to Schmidt?

A. Called to Schmidt there before he came to me, before Wilson came with me.

Q. Now after—what were you doing when Wilson called Schmidt?

A. I was cutting 2x4.

Q. When did Wilson come in where you were, in the south entry?

A. When?

Q. Yes.

A. I don't know what you mean.
132 Q. Well, he called to Schmidt, you say?
A. Yes, called to Schmidt.
Q. Now, after he called to Schmidt, Schmidt came out?
A. Yes, sir.
Q. What did Wilson do when Schmidt came out?
A. Well, may be he talked with him, what he had to do. I don't know what he said. Wilson then came with me to help me.
Q. Who did?
A. Wilson.
Q. Came in to help you?
A. Yes.
Q. How soon did he come in to help you?
A. Oh, may be a few minutes after.
Q. What did he do?
A. He held some 2x4 and cut it, because it swing all over, you know, on top of the boxes.

He stayed there with me fixing the boxes may be five or six minutes, and then the explosion came and knocked me down and put out our lights. After the explosion I looked to get a light, and I couldn't find my lamp. I got matches from my pocket. The other fellow is away first. I can find no lamp. It is dark there. I got some matches and lit it and find my lamp there. Then I went west that way and found a man got burned. I found Schmidt in there and took him from the bottom and took him on top. After we got on top I go down again and see where Sam Fulton was. I help him about an hour or two after. I don't know what time. We took him on top right away.

Cross-examination.

By Mr. HALEY:

I can't understand everything in the English language. I speak French. There are some words said in the English language that I don't understand. On the Sunday morning that Mr. Fulton was killed, I got to the mine on the top a little before seven o'clock.
133 We go down after seven. Ed Pierard went with me to the mine. It was about five minutes after seven when we go down. The engineer that ran the engine was Charlie Bromley. He was there when we got there and was running the engine. I think Bromley started to work about eight o'clock in the morning. I don't know what time he started that time. He was at the mine when we came out. I don't remember at seven o'clock. I don't know the engineer that let us down. I was there at seven o'clock. I can't remember if Bromley was the fellow that was there at seven o'clock. I know he was on top when we came up after Mr. Fulton was called.
Q. When did you come up out of the mine. How long did you stay there that morning?
A. Fulton is dead right away the first time.
Q. Did you come up when Fulton was brought up?

A. No, we take Paul Schmidt.
Q. Did you come up with Schmidt?
A. Yes, sir.
Q. And Bromley was there at that time, was he?
A. Yes, sir, he was there.

It cannot be after eight o'clock, I don't think. We start at seven. It is quite a time till we go down, take the things off the cage and start the fan; and Bromley was there when we brought Schmidt up. We brought Schmidt up right when he was hurt, and Bromley was the engineer.

Ed Pierard went down with me in the mine. The fan was not going when we went down. I don't know, I am sure, how long that fan had been in place there in that mine before that time. My recollection is three or four weeks, I don't know how long, may be more and less. After it was put in, it was kept running while the men were at work, and it was started before the men came into the
mine every morning. We depend upon that fan to take the
134 gas out of the mine. When Pierard and I went down the
first thing that morning we did not start the fan. I know about how the fan was started. There is a valve on the pump—close to the pump, and one on the fan engine. As to the kind of apparatus there was to start the fan,—one with the round on the fan, and the other we have to open. We start with the wrench and open with the fingers. We couldn't open it with out fingers unless we had a wrench to start it. I don't know where the wrench was that morning. I didn't look for it. They got one on top; they couldn't find the one that ought to have been down below. Johnnie Wilson looked for it. I didn't make any search for it. I don't know whether Pierard looked for it.

Q. But Wilson did look for it, did he?
A. Yes, he went up on top and got one.

There was no one there at the mine when I got there that morning. To give the signal to start the cage down, so that you could go into the mine, you got a wire, a bell to the engine. Us fellows didn't take anything down with us. As soon as we got down there we got the 2x4's and started to work. Pierard started to dig a hole in the wall, and I commenced sawing the 2x4's and dug some holes too. We had been there 15 or 20 minutes before anyone else came down.

Q. You don't know whether it was 15, 20, 30 or 35 minutes, do you?
A. No.
Q. But you were down there at work?
A. Yes.
Q. And how long you were at work, you don't remember, before some one else came down?
A. Yes.

The first persons I saw at the bottom of the shaft were Schmidt, Sam Fulton and Johnnie Wilson. I don't know for sure if they
came at the same time. I saw them on the plate. I am not
135 sure whether they came down separately or came down together. All I remember about that is that I saw them down

there together at the same time. Me and Ed Pierard took all the tools off the cage, and some rails and some switch, put them on the plate and some on the cars. The plate is where you put the car, to put the car on the cage. It is a small piece, a square about two feet square. It is a floor of iron plates. You can switch a car around on it, turn it around any way you want. Pierard and I helped to take the stuff off of the cage and put it on the car on the side. There were some switches on it. There may be some little railroad rails in the bottom. I don't know. I never loaded any rails on the car. I don't know if we got any rails on the bottom or not. I don't remember whether there were any rails on the car or not. I know we got switches. The next thing done after I had helped unload the cage was that the men came down. I don't know for sure what happened after the men came down. As to starting the fan, that is what we start, every one. Johnnie Wilson did the work of starting the fan. He is away to the pump and try to open the valve, and he could not do it.

Q. Did he turn on the valve that had the little wheel on the top?

A. On the top?

Q. Was not there a valve there with a wheel on it?

A. That wheel is on the fan.

Q. You can turn the wheel, and that opens that, doesn't it?

A. Yes, sir.

Q. But the one that didn't have any wheel on, he tried to turn that and he couldn't?

A. He could not because he had no wrench.

Q. And then what did he do?

A. He is going on top. He say, "I will be back right away."

136 Q. And he came back with the wrench and finally turned back and then the fan had the steam?

A. Yes, sir.

I helped to start the wheel, that big one where the bolt goes in, and then the fan runs. After the fan started, I oiled the fan and the engine. At that time Pierard was there on the bottom with me, and Wilson was on the pump. Sam Fulton was there with us, and Schmidt. After that I go to the south entry. We pulled the edge of the bottom about 150 feet from the boxes.

Q. You were about 14 or 15 feet in, and where was Pierard?

A. About 25 feet further.

I don't know who went in first, Pierard or I; both together, and Schmidt too. I think Schmidt go after Ed. I don't recollect whether he did or not. I don't remember at all whether it was before I went in or after. Schmidt was helping Ed Pierard.

Q. Wilson and Fulton were in at the bottom or in the opening?

A. Came in on the bottom. I don't know what he is doing there.

Q. Was there any talk around there before you went in?

A. Before?

Q. Yes.

A. Well, Johnnie Wilson came after I came in.

Q. I know, but was there any talk between Fulton and Schmidt before you went in?

A. I don't know, sometimes; what?
Q. Do you remember if anything was said there at all?
A. No.
Q. You don't remember any of the conversation there at the bottom, do you?
A. I remember one after, after I go in the bottom. I hear him say take his time.
137 Q. You hear that at the bottom?
A. Yes, that is what I hear.
Q. What was that now?
A. What?
Q. What did you hear?
A. "Take a time."
Q. Take his time about what?
A. Oh, I don't know for sure.
Q. What was Fulton doing at the time?
A. He is there with Wilson.
Q. What was he doing? Handling anything? Had he not a rail in his hand?
A. Nothing at all.
Q. Or props or anything of that kind?
A. No.
Q. You are sure he didn't say to take your tools, did he?
A. No.
Q. You don't understand English very well?
A. I understand take your tools, or take your time, too.
Q. You understand take your tools or take your time?
A. Sure.
Q. And there was nothing said about tools?
A. No.
Q. And this man was doing nothing at the time, was he, Fulton?
A. Nothing at all, sir.
Q. And Wilson was not doing anything?
A. No, sir; stand up in the bottom, that is all.
Q. You did not hear what they were talking about; you didn't know what they were talking about?
A. No, I hear talk from them, that is all, When I take that piece 2 x 4 to this work and I go back.
Q. Did you at that time look to see what either of them were doing?
A. I got no business to do that. When a man talk I have nothing to say.
Q. Sir?
A. When some man talk the two together, I got nothing to say there.
Q. You have no right to listen to a conversation?
138 A. No, I have my work.
Q. Then you had no right to hear what was testified to here, when you heard him say take his time?
A. When you pass one man, if he talk something, you can hear

what he say. If you stay a little longer, you can hear all that he say. Well, I not stay long enough to hear him.

Q. Then as a matter of propriety you did not stay to listen any more?

A. I hear "take a time," and that is all they say.

Q. You just listened to that much?

A. Yes.

Q. What was said before, and what was said after, you did not hear?

A. No.

Q. Because if you waited there, you would be doing what you think would be wrong, listening to a conversation you had no right to hear. That is the idea, is it?

A. I don't know what you mean.

Q. Now, after having heard that much, which I suppose you could not help hearing——

A. No, nothing at all.

I then went back to the south room and started sawing wood to put in. It couldn't be very long after that before I heard Wilson call Schmidt, may be a couple of minutes after that; it could not be five minutes; it might be two or three. He called Pierard that is all. When he called him, he passed by me and went right to the bottom and I still continued with my work. Wilson came right along in after that. I don't know about how many minutes; a couple of minutes. It is pretty hard to count a minute. He came sometime afterwards. After he came in, Johnnie Wilson he held the piece 2x4 when I cut it. It was swinging on top of the air box. Johnnie and I were at work there, and the other men, when the explosion came and threw us down. I didn't see Schmidt and Fulton push the car out; I never saw them after I went in to cut the wood.

139 Q. You did not see them after you heard these words, "Take your time?" That is the last you heard or saw or paid any attention to until Wilson passed Schmidt. Then after a while, you can't tell how long, Wilson went in there, and about the next thing was the explosion. That is about the way you recall it?

A. Yes, sir.

It knocked me down. I don't know who got the light first after the explosion. After the explosion I saw Schmidt 25 or 30 feet; 25 on the west road, may be 25 or 35 feet on the west road from the bottom. He was crawling on his knees. I went back to help carry Fulton. We found Fulton, I don't know for sure, may be 50, 60 or 55 feet from the end of the road. I don't know how much. When I saw Sam Fulton he was on top of the air box. I don't know who put him on, because Johnnie was there first, and Johnnie Wilson put Sam on top of the air boxes, you see. The car was away there some place on the road. I don't know where. I don't know how far it is exactly. This is a plat of the mine (indicating). I have seen it lots of times in the shops. We keep some in the shop all the time, on the shelf. That had to be one. I am familiar with this (indicating). That is the air shaft over here to the east, and this (indicating) is the bottom here, and here is the west roadway.

Q. Now which of the two roadways did you find?
A. This straight west.
Q. That would be the farther south of the two roadways, the south roadway of the two westerly roadways, this, here?
A. Yes, that is the straight west.
I don't know how far back I found Fulton; here some place, top of the boxes. I can't tell exactly. About from half the way in. The air box was broken here. The car was about here some place. It was not farther in than Fulton. The car was there on the
140 side. It was farther west than Fulton. The rails and ties were off the track. The rails were by the car. Some was off the road. I don't know whether any of the rails were on the car or not. Some props were there yet. I don't remember whether the rails or points were on the car. Where Sam Fulton sat on the car, the air boxes were all smashed, all the way in farther. I don't know how near to where we found Fulton the boxes were broken, because we took some off and took him on top. He was about half way down the road. From half way down the road, the boxes were broken clear out down to the end.

Redirect Examination.

By Mr. SIDLEY:

Mr. Wilson was standing on the bottom at the time that he called to Schmidt. Wilson called Schmidt, and Schmidt came in and talked to him, and after he came to me. When Wilson called Schmidt, Schmidt was back in the end in the south, and he came out then when Wilson called to him. He went out to where Wilson was. After Schmidt got there, it was a few minutes before Wilson came in to where I was. I don't know how much. After Wilson called to Schmidt and Schmidt went out to where he was, I see Johnnie Wilson there and Schmidt. Everybody — there on the platform.
Q. I am talking now about the time that Wilson called Schmidt out to help. You understand that?
A. I don't know if he was calling Fulton or not.
Q. Now Schmidt went out to the bottom where Fulton was or to where Wilson was.
A. In the bottom too.
Q. Wilson was at the bottom too?
A. Yes.
Q. Now did you see them standing there together?
A. He is there on the bottom, right at the south.
Q. Right at the south?
A. Yes, sir.
141 Q. Now what I want to get at is this: How long was it after Schmidt came out to where Wilson was, before Wilson came in to where you were?

The COURT: He said a few minutes, five or six minutes.
Mr. SIDLEY: No, now I want to correct that. I think there is a misapprehension.
(Question read.)

A. A few minutes.
Q. Now did you hear any conversation at that time between Schmidt and Wilson?
A. No.
Q. You didn't hear any?
A. Nothing at all.
Q. Now, when Wilson came in where you were, how long was it after that that the explosion occurred?
A. May be five or six minutes after.

Mr. SIDLEY: The Court, I think, was mistaken on that point.
Mr. HALEY: You don't remember the number of minutes. You just guess at it.
The WITNESS: No, I don't keep track of that.
Counsel for the defendant thereupon offered in evidence and read to the jury the præcipe in the case of Leopold Schmitz *vs.* Wilmington Star Mining Company, in which his deposition read in evidence was taken, for the purpose of showing the interest of said Schmitz, said præcipe showing that the suit was an action on the case for $10,000.
Counsel for defendant thereupon further offered in evidence and read to the jury the certificates issued by the Illinois State Mining Board to the witnesses Pierard and Wilson, which were referred to in their preceding testimony, which certificates were respectively as follows:

142 No. 194.

STATE OF ILLINOIS:

Certificate of Competency.

State Mining Board.

Mine Examiner.

This Certificate is issued to Edward Pierard of Coal City, County of Grundy, Illinois, who having passed the necessary examination is hereby qualified to act as Mine Examiner, in any mine in this State.
Given at Springfield, this 10th day of December, 1900.

[Seal of Illinois State Mining Board.]

R. NEWSAM, *President.*
PATRICK McCANN, *Vice President.*
JAMES TAYLOR.
COCHRAN JOHNSTON.
HUGH MURRAY, M. E.

Age 27, Birthplace Belgium, Mining Experience, Fifteen Years.

143 No. 54.

STATE OF ILLINOIS:

Certificate of Competency.

State Mining Board.

Mine Manager.

This Certificate is issued to John Wilson of Coal City, County of Grundy, Illinois, who having passed the necessary examination is hereby qualified to act as Mine Manager, in any mine in this State.

Given at Springfield, this Twelfth day of April, 1900.

[Seal of Illinois State Mining Board.]

R. NEWSAM, *President.*
PATRICK McCANN, *Vice President.*
JAMES TAYLOR.
COCHRAN JOHNSTON.
HUGH MURRAY, M. E.

Age 45, Birthplace Scotland, Mining Experience, Thirty-five Years.

144 Defendant here rested.

The foregoing is, in condensed form, all the evidence offered or received on trial of this cause.

And thereupon the defendant moved the Court in writing that the jury be instructed to find the defendant not guilty, which motion is in the following words, to-wit:

"MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

"Now comes the defendant, by Holt, Wheeler & Sidley, its attorneys, at the close of all the evidence offered in this cause, and moves the Court to instruct the jury to find the defendant not guilty.

HOLT, WHEELER & SIDLEY,
Attorneys for Defendant."

And the defendant by its counsel then and there stated to the Court, as and for one of its grounds for said motion to instruct the jury to find the defendant not guilty, that the provisions of the Mining Act of Illinois upon which this action is based, and upon which each of the counts is based, were contrary to the Fourteenth Amendment of the Constitution of the United States to the effect that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due

process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

But the Court overruled said motion to instruct the jury to find the defendant not guilty; to which ruling of the Court the defendant by its counsel then and there duly excepted. And the Court refused to instruct the jury to find the defendant not guilty; to which ruling of the Court in refusing to give said instruction the defendant by its counsel then and there duly excepted.

145 Thereupon the Court charged the jury as follows:

The COURT: Gentlemen of the Jury: It is your duty to pass upon the facts, and the facts alone. Whatever remarks the court has made or may make in reference to the facts you are not to consider. You are the sole judges of the facts in every law suit. That is the duty of the jury. The court has the right to comment in the Federal court upon the facts, but this is not to influence the jury; you are the judges upon that question. But it is otherwise as to the law. You are—In this kind of case in every case in the Federal courts it is your duty to take the law from the court. It is not your duty to criticise it, or to find fault with it, but to follow it and to enforce it as given by the court. It is neither for you or for me to try to determine whether the law is a good law or a bad law. Your sworn duty is to enforce the law—the law as it is written, and the law as it is given to you by the court.

Now, in this kind of a case, it appears, as has been stated by Counsel, that the Legislature and the law making power of the State of Illinois has passed a law framed peculiarly for he protection of miners—coal-miners and other kinds of miners. They have changed the rules of the Common Law and made the rules of the Statute Law as applicable to the case of master and servant, to negligent cases. This law, so far as applicable to this case, is in substance as follows: It provides for a mine manager and his duties; and among other things it has reference to ventilation. It provides that it shall be the duty of the mine manager to see that cross-cuts are made at proper distances apart to secure the best ventilation at the face of all working places, and that all stoppings along air-ways are properly and promptly built. He shall keep careful watch over all ventilating apparatus and the air-currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed

146 or stopped, he shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established. It provides also for a mine examiner, and the duties of the mine examiner. A mine examiner shall be required at all mines. His duty shall be to visit the mine before the men are permitted to enter it, and, first, he shall see that the air current is travelling in its proper course and in proper quantity. He shall then inspect all places where men are expected to pass or to work and observe whether there are any recent falls or obstruction in rooms or roadways, or accumulations of gas or other unsafe conditions. When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at

once report his finding to the mine manager. No one shall be permitted to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein, except under the direction of the mine manager, until all conditions have been made safe. Throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and such ventilation shall be produced by a fan, or some other artificial means.

There is also a provision, and counsel for the defence has called attention to that fact, that it shall be unlawful for any miner, workman or other person knowingly or carelessly to injure any shaft, safety lamp, instrument, air-course, or battrice, or to obstruct or throw open any airway, or carry any open lamp or lighted pipe or fire in any form into any place worked by the light of safety lamps, or within five feet of any open powder, or to handle or disturb any part of the hoisting machinery, and in cases of failure to
147 follow that law as it is made penalties and punishments are provided.

For any injury to person or property, occasioned by any wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby. You will notice that it is for "wilful violations" a right of action lies for "direct damages." And, in case of loss of life by reason of such wilful violation as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of live or lives, not to exceed the sum of five thousand dollars.

Then again, it is provided in this Act that the words "Mine" and "coal mine," used in their general sense, are intended to signify any and all parts of the property of a mining plant, on the surface or underground, which contribute, directly or indirectly, under one management, to the mining or the handling of coal.

Now, while this is a Federal Court, and while that law is to govern this court, the same as in the State Court, the Declaration filed in this case, the cause of action, as set out by the plaintiff, and upon which they must rely, contains eight different counts, or eight different grounds of action, which, under the law, can be tried together in one. In the first count here, as presented here, they rely upon the statement that the defendant—that on the 22nd day of January, 1901, the deceased worked as an employé for the defendant
148 in a certain coal mine in Grundy County; that it then and there became and was the duty of the said defendant in the management and operation of said coal mine to maintain therein currents of fresh air sufficient for the safety of all men and animals employed therein, by the statute in such cases made and provided; and that said defendants were wholly regardless of its duties; that it wilfully and knowingly —, and as a direct — of that the death of the deceased followed.

The duty charged in the second count is that it was the duty of the

said defendant in the use, management and operation of said coal mine to see that inside the coal mine cross cuts were made at proper distances apart to secure the best ventilation at the face of all working planes as by the statute in such cases made and provided, and they failed to do that, and as the result the death of Fulton followed.

The count charges that their duty was in the use, management and operation of said coal mine to see that all stoppings along air ways inside the coal mine were properly and promptly built, as provided by the Statute of the State of Illinois, but they failed to perform that duty and as the result the death of the deceased followed.

In another count they charge that the duty was—the duty of the said defendant in the use, management and operation of said coal mine, to keep careful watch over all ventilating apparatus and air currents, and in case of accident to fan or machinery by which said currents were stopped, he should at once order the withdrawal of the men then inside the coal mine, and prohibit their return thereto until thorough ventilation had been re-established, and they charge that they did not do that, and the death of the deceased followed.

149 Another count they charge that it then and there became and was the duty of the defendant in the use, management and operation of said coal mine to inspect all places therein where men were expected to pass or to work and observe whether there was then and there an accumulation of gas, especially before said Samuel Fulton and other employees were permitted to enter into said mine, and they charge that defendant did not do this duty and that through that this death in question followed.

Another count they charge that it then and there became and was the duty of the said defendant in the use, management and operation of said coal mine that it was the duty of the mine examiner to visit the said mine before the said Samuel Fulton and other employés were permitted to enter the same, to see that the air current in said mine was traveling in its proper course and in proper quantity, and they charge they wilfully failed to do that, and this death followed.

Another count they charge that the duty was of the said defendant in the use, management and operation of said coal mine, when working places were discovered in which accumulations of gas exist, the mine examiner shall place a conspicuous mark thereat as notice to all men to keep out, as by statute in such cases made and provided; they charge that they failed to do that duty wilfully, and as a result the death of the man in question followed.

The duty in another count charged is that it was the duty of the said defendant to refuse to allow the said Samuel Fulton in the said coal mine, to work therein, until all conditions in said coal mine should have been made safe, except under the direction of the mine manager, and they charge that they failed to do their duty in that regard wilfully, and that as the result thereof the death of Samuel Fulton followed.

150 You will observe that these charges and declarations are based upon the portions of the law to which I have called attention.

The defendant replies to these declarations, denying the statements of those several counts and you are to determine the questions of fact raised by the issue there joined.

If you believe from the evidence that any of the counts in that declaration are sustained by the preponderance of the evidence then it is your duty under the further instructions of the court to find for the plaintiff.

If you believe from the evidence that all the counts have not been sustained—if you believe, that is, that none of the counts have been sustained by the evidence you shall, under the further instructions of the court find for the defendant.

You are further instructed that under the laws of the State of Illinois a coal mine is a place first as described in the Statute I have read to you, and, second, it is a place below the surface of the earth where coals are taken out of the shaft or pit, and machinery used in raising and discharging coal therefrom, and if you believe from the evidence that prior to January 27, 1901, coal was mined, dug, or placed by the defendant on its mine, commonly known as Number Six, and thereafter raised by machinery to the surface of the earth for use in the business of the defendants, for sale or other proper business of coal mining, as you understand it from the definitions given to you here, and from what you know of your own general knowledge, then the defendant's mine Number Six comes within the provisions of the Mining Act of Illinois, and the defendant is liable to the plaintiff in this suit for the loss of any support she may have sustained, as shown by the evidence, and for any wilful failure on the part of the defendant to comply with any provisions of
151 the Mining Act of the State of Illinois, complained of in any one of the counts of the plaintiff's declaration read to you.

There seems to be some contention here on the part of defendant as to whether this was a coal mine; and as to whether it was in operation. I will submit that question of fact to you to determine, whether it was a coal mine in operation, under the instructions given to you. If it was not in operation, and coal was not taken out of there for use and treated as an ordinary coal mine, and it was not complete then, on that issue, it will be your duty to find for the defendant. On the other hand, if you believe it was a coal mine, and the law as read to you and here recited to you, covers that kind of a case, in the spirit and the letter and fact, of course upon that issue you will find for the plaintiff.

The jury are again instructed that under the law of the State of Illinois it is the duty of the mine manager to see that throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and if you believe from the evidence that the defendant in this case wilfully violated or omitted to comply with that statutory obligation, and that by and through its said violation and omission to perform its statutory duty the accident complained of in the said declaration or any count thereof occurred, and as the direct, proximate and immediate result thereof the plaintiff's deceased husband, Samuel Fulton, was killed, then you should find the issue for the plaintiff, and find the defendant guilty.

The plaintiff, in the various counts of her declaration, charges violations and omissions of certain statutory duties imposed upon the defendant herein as a mine owner by the provisions of the Mining Act of the State of Illinois; and if you believe and find from
152 all the evidence that the defendant in this case has wilfully violated, or omitted to comply with any of the said statutory obligations, as charged in any count of the plaintiff's declaration, and that by and through its said wilful violation of the Mining Act, or any of its said duties, to the extent complained of in one or more counts of the plaintiff's declaration, and that as the direct or proximate result, in the language charged or relied upon, the plaintiff's deceased husband, Samuel Fulton, was killed, then you should find the defendant guilty.

The jury are further instructed that if you find from all the evidence and under the instructions of the court that the defendant wilfully violated any of the provisions of the laws of the State of Illinois, as charged, in one or more of the counts of the plaintiff's declaration herein, and if such act or omission on the part of the defendant was the direct or proximate cause of the death of Samuel Fulton, then no contributory negligence, if any, on the part of the deceased will defeat the defendant's right to recover herein, and you should find the defendant guilty.

You are instructed that under the laws of this State in force at the time of Samuel Fulton's death it was unlawful for any miner or other workman in a mine to enter any part of the mine against caution, and such unlawful act was punishable by a fine not exceeding Five Hundred Dollars, or by imprisonment in the County Jail for a period not exceeding six months, or both, at the discretion of the court. You are further instructed that if you believe from the evidence that Samuel Fulton, just prior to the time that he was killed, was cautioned not to enter the west roadway until the fan had cleared out the gas therefrom and the mine manager, Wilson, had run up into said roadway with a safety lamp and tested the
153 air, or words to that effect, and that Fulton disregarded said caution, and entered said west roadway before the fan had cleared the gas therefrom and before Wilson had tested the air in said roadway with a safety lamp, and that as a result of so entering said roadway Fulton lost his life, then the plaintiff cannot recover in this action and your verdict must be for the defendant.

If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west road way, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the defendant.

You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must determine whether first, if there was gas there at that time and whether, if there was that was or was not the proximate cause of his death.

Now, by "proximate cause" is meant efficient cause. In other words, if the gas had not been there would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there the thing which caused his death; which was the greater cause? That is a question of fact for you gentlemen to determine.

If you believe from the evidence that Samuel Fulton entered the part of the mine in which he was killed against or contrary to caution given him by the mine manager, Wilson, and if you believe that such action on Fulton's part directly contributed to his death, then you are directed to find the defendant not guilty, even
154 though you may further believe from the evidence that the defendant was guilty of one or more of the wilful violations of the mining act charged in one or more counts in the declaration.

Now, in passing upon that question as to whether mine manager Wilson gave the instruction that he said he gave, or whether he gave no instruction, or whether he told them to go you are to determine from what you saw of the witnesses, what you observed of the men, and their conduct upon the witness stand, and from their evidence in the case, and circumstances in evidence in the case, and how much of those stories you would believe.

It would be proper for you to take the number of witnesses in consideration, but it does not necessarily follow that one witness or two witnesses may not tell the truth while a greater number of witnesses may or may not be mistaken.

The defendant in this case is a corporation, and therefore can only act by and through its officers, agents or employees; and you are instructed, that any act or omission of any of its said officers, agents or employees done or omitted in the usual manner and course of their employment, and in the scope of their duties as such officers, agents or employees was the act or omission of the defendant; and if the jury find from all the evidence and under the instructions of the court such officers, agents or employees, or any of them, acting in the usual and ordinary course of their employment, and in the scope of their duties, did wilfully, and knowingly fail to comply with the provisions of the said Statute of Illinois declared upon in any count in the plaintiff's declaration, and such wilful failure to comply with the law as aforesaid is the proximate cause of the death of the deceased husband, Samuel Fulton, then you should find the issue for the plaintiff.

155 You are further instructed that it is your duty to try this case and to decide the same as though it were a case between two individuals. That the defendant, being a corporation is entitled to the same fair, unprejudiced treatment and consideration at your hands that a private person would be in like circumstances; and you have no right in considering this case, in any of its branches, to take into consideration that the defendant is a corporation, and for that reason discriminate against it either on the question of liability or the amount of damages, if you assess damages against it.

Neither are you to be influenced by the fact that the plaintiff is a woman, and that she has children; and that the trial is about a

dead person; nor to be influenced by your sympathies. But influenced by your judgment and your duty under the law and under the instructions of the court.

You are further instructed that the plaintiff in order to recover in this action must prove by the preponderance or the greater weight of the evidence that if the defendant has violated one or more of its duties under the Mining Act of this State, as charged, and that said Samuel Fulton was injured thereby, that the said violation was wilful on the part of the defendant.

You are further instructed that the word "wilful" as used by the court in its instructions, means a conscious act, or conscious omission to act on the part of the defendant; it implies no malicious or criminal intent. It means simply that the defendant knew what he was doing, and intended to do what it did, and it was free to do as it chose.

Where an owner, director or manager of a mine so constructs or equips his mine and knowingly operates it without conforming to the provisions of this Act he wilfully disregards its provisions
156 and wilfully disregards the safety of the miners employed therein.

The Statute herein involved is not a penal statute. The word "conscious," I think, and the word "intentional," and the word "knowingly" covers the meaning of the word "wilful," as used in that secton of the Statute. "Knowingly," and "Intentional."

You are further instructed that in order for the plaintiff to recover in this action it must appear from the evidence that some one of the facts charged against the defendant in the declaration was the proximate cause of Fulton's death. By the term "proximate cause" is meant an act or omission from which the accident naturally resulted, and which was an efficient cause without the happening of which Fulton would not have been killed.

You are instructed that by no act done or anything said by the court during the trial of this case does the court mean to influence the jury in the slightest degree, one way or the other, as to its judgment on the question of fact.

You are instructed as a matter of law that the plaintiff is not entitled to recover in this action any sum whatever as a penalty or fine against the defendant or by way of punishment, but that her damages, if upon the evidence and under the instruction of the court you find she is entitled to any, must be confined to such a sum as you believe from the evidence the decedent Samuel Fulton would probably have earned during the remainder of his probable life and have expended upon or for the benefit of the plaintiff and her children, together with the pecuniary value of said decedent's services in the attention to, care, education and superintendence of his children and family, if you believe from the evidence that there
157 is a reasonable certainty that the plaintiff and her children would have received any such services from the decedent during the remainder of his natural life, and further believe that there is evidence in the case from which the money value of such services can reasonably be estimated. In estimating the sum, if any, to

which the plaintiff is entitled under the foregoing instruction, you are to consider the age of the deceased, his education, business capacity, ability and disposition to labor, his habits of living and disposition towards the physical and mental welfare of his family, but you are not to consider, in reaching such estimate, the present pecuniary circumstances of the plaintiff.

You are also to consider if there is any evidence on the subject of wages he was able to earn and had been earning.

There is quite a large lee way of any amount under Five Thousand Dollars, if you conclude the plaintiff is entitled to a verdict, that is proper under the instructions and directions I have already given you.

You are further instructed that the plaintiff in this case is not entitled to punitive or exemplary damages, that is, damages by way of punishment to the defendant.

You are the sole judges of the credibility of the witnesses testifying in the case. If you believe from the evidence in this case that any witness knowingly testified falsely to any material facts in this case you have a right to disregard the entire evidence of such witness or witnesses, except in so far as the evidence of such witness or witnesses is corroborated by other credible evidence in the facts and circumstances appearing in the trial.

You are further instructed that the declaration filed in this case is merely the unsworn statement of the plaintiff and is not entitled to any weight as evidence, and should not be considered by you in the light of evidence in determining this case, as it is merely
158 a statement of what the plaintiff expects to be able to prove.

You are instructed that if you believe from the evidence in this case that the deceased Samuel Fulton came to his death by an accident without the fault of either party, then your verdict should be not guilty.

I believe that is all I desire to say.

And thereupon the Court, at the request of counsel for defendant, further instructed the jury as follows:

Gentlemen, If I called your attention to any section of the law that is not counted upon in the declaration, you are not to consider that in this case. You are simply to consider, and can only consider, the law as stated to have been violated in these eight counts of the declaration I have read to you and called your attention to.

159 Thereupon the defendant by its counsel then and there duly excepted to the ruling of the Court that no contributory negligence on the part of the deceased would defeat the plaintiff's right to recover herein, thereby excluding gross contributory negligence by the plaintiff's intestate as a defense, as shown by the following portion of the foregoing charge of the Court to the jury:

"The jury are further instructed that if you find from all the evidence and under the instructions of the Court that the defendant wilfully violated any of the provisions of the laws of the State of Illinois as charged in one or more of the counts of the plaintiff's declaration herein, and if such act or omission on the part of the defendant was the direct or proximate cause of the death of Samuel Fulton, then no contributory negligence, if any, on the part of the

deceased, will defeat the plaintiff's right to recover herein, and you should find the defendant guilty."

Thereupon defendant by its counsel also then and there duly excepted to the ruling of the Court in its definition to the jury of proximate cause, that if the presence of gas in the mine was necessary to the death of plaintiff's intestate, then Wilson's direction to such intestate to go into the west roadway of the mine would not be the proximate cause of his death, as shown by the following portion of the charge of the Court to the jury:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the
160 defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must. determine whether, first, if there was gas there at that time; and whether if there was, that was or was not the proximate cause of his death. Now by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there, the thing which caused his death; which was the greater cause? That is a question of fact for you to determine."

Thereupon the Court said, referring to the exception last above noted by counsel for defendant: "I said it was for them to determine what was the proximate cause, if there was an order for this deceased to go into the mine, or whether it was the gas being there. Let the instruction be what I state it now the last time, that covers it."

To which ruling of the Court, in so far as it made the question of proximate cause in this case turn upon the presence of gas in the mine, and the necessity of such presence for Fulton's death, defendant by its counsel then and there duly excepted.,

Thereupon the defendant by its counsel also then and there duly excepted to the ruling of the Court that the defendant was bound by the act of any of its agent or servants in respect to the matters complained of in this suit, as shown by the following portion of the foregoing charge of the Court to the jury:

"The defendant in this case is a corporation, and therefore can only act by and through its officers, agents or employees; and you are instructed, that any act or omission of any of its said officers, agents or employees done or omitted in the usual manner and course of their employment, and in the scope of their duties
161 as such officers, agents or employees was the act or omission of the defendant; and if the jury find from all the evidence and under the instructions of the Court such officers, agents, or employees, or any of them, acting in the usual and ordinary course of their employment, and in the scope of their duties, did wilfully and knowingly fail to comply with the provisions of the said Statute of Illinois declared upon in any count in the plaintiff's declaration,

and such wilful failure to comply with the law as aforesaid is the proximate cause of the death of the deceased husband, Samuel Fulton, then you should find the issue for the plaintiff."

Thereupon the Court, referring to the exception of defendant's counsel last above noted, said: "I will amend that by saying any agent, employe, or whatever other word to indicate officer, agent or employe that is the representative who has power to do the business of the defendant.

To which ruling of the Court, in so far as it held that the defendant would be liable in this suit for the act of any agent or representative other than the officers of the defendant, defendant by its counsel then and there duly excepted.

Threupon the Court, referring to the exception by defendant's counsel last above noted, said: "That is limited to the superiors—it is limited to the mine manager and the mine examiner."

To which ruling of the Court, in so holding and directing that the jury should find the issues for the plaintiff if they found from all the evidence and under the instructions of the Court that the defendant's mine manager or mine examiner acting in the usual and ordinary course of their employment in the scope of their duties did wilfully and knowingly fail to comply with the provisions of the Statute of Illinois declared upon in any count in the plaintiff's declaration, and such wilful failure to comply with the law
162 as aforesaid was the proximate cause of the death of the deceased husband Samuel Fulton, defendant by its counsel then and there duly excepted.

163 Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the fourth of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by
164 the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the seventh of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which this action proceeds.

But the Court refused so to charge the jury as requested by
165 the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which the action proceeds, for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the

second of the eight counts of her declaration upon which the action proceeds, for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which the action proceeds, for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of.

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Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the sixth of the eight*h* counts of her declaration upon which the action proceeds, for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

167 Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

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proceeds, for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which the action proceeds, for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which this action proceeds, for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

168 Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds, for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States.

But the Court refused to so charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

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The jury are instructed that the plaintiff cannot recover under the seventh of the eight*h* counts of her declaration upon which this action proceeds, for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

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The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which this action proceeds, for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

If you believe from the evidence that the death of Samuel Fulton resulted in part from his own gross negligence in view of his surroundings and his knowledge of the conditions existing in the mine

as disclosed by the evidence, then you are instructed that the plaintiff cannot recover herein.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

You are instructed that under the laws of this State in force at the time of Samuel Fulton's death it was unlawful for any miner or other workman in a mine to do any wilful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof was endangered, and such unlawful act was punishable by a fine not exceeding $500, or by imprisonment in the County jail for a period not exceeding six months, or both, at the discretion of the Court. You are further instructed that if you believe from the evidence that Samuel Fulton, at the time he
171 was killed, was engaged in a wilful act which endangered the lives or health of persons working in the mine with him or the security of the mine or its machinery, and that such wilful act on his part contributed to his death, then the plaintiff cannot recover in this action and your verdict must be for the defendant.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

If you believe from the evidence that the death of Samuel Fulton resulted in part from his reckless disregard of consequences in view of his surroundings and knowledge of the conditions existing in the mine as disclosed by the evidence, then you are instructed that the plaintiff cannot recover herein.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

Thereupon the defendant by its counsel then and there requested the Court to further charge the jury as follows:

If you believe from the evidence that the decedent Fulton just before the time of his death entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant "not guilty," even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration.

But the Court refused so to charge the jury as requested by the defendant, to which refusal the defendant by its counsel then and there duly excepted.

172 Thereupon the jury retired and thereafter returned a verdict for the plaintiff for Four Thousand Dollars, and the defendant entered a motion to set aside said verdict and for a new trial of said cause. Afterwards the Court overruled said motion, to which action of the Court the defendant by its counsel then and there duly excepted. And thereupon the defendant by its counsel moved the

Court to arrest the judgment in said cause, which motion the Court overruled, to which action of the Court the defendant by its counsel then and there duly excepted. And thereupon the Court entered judgment upon the verdict, and allowed time to the defendant to file its bill of exceptions herein; to which action of the Court in entering judgment the defendant by its counsel then and there duly excepted. And the Court thereupon directed the computing of interest upon the verdict from the date thereof and its inclusion in the judgment; to which action of the Court the defendant by its counsel then and there duly excepted.

173 In the Circuit Court of the United States, Northern District of Illinois, Eastern Division.

MINNIE FULTON, Plaintiff,
vs.
WILMINGTON STAR MINING COMPANY, Defendant.

I, Solomon H. Bethea, Judge of the Circuit Court of the United States for the Northern District of Illinois before whom the above entitled case of Minnie Fulton *vs.* Wilmington Star Mining Company, defendant was tried, do hereby settle the foregoing as and for the Bill of Exceptions therein, and do hereby certify that the foregoing bill of exceptions contains all the evidence offered by either party on the trial of said cause, and all other proceedings had and taken thereon, material or in any way relevant to the rulings of the Court made upon said trial, or to the objections and exceptions made and taken by the respective parties upon said trial, which said rulings, objections and exceptions are in this said Bill of Exceptions shown and made manifest, and do hereby make the same matter of record in said cause.

In Witness Whereof, I have hereunto set my hand seal this twenty-ninth day of September, A. D. 1905.

S. H. BETHEA, *Judge.* [SEAL.]

O. K.
EDDY, HALEY & WETTEN.

(Endorsed:) Filed Sep. 29, 1905. Marshall E. Sampsell, Clerk.

174 And on to-wit: the twenty-ninth day of September, 1905, came the Wilmington Star Mining Company by its attorneys, Messrs. Holt, Wheeler and Sidley and filed in the clerk's office of said Court its certain Petition for Writ of Error and Assignment of Errors in words and figures following to-wit:

175 *Petition for Writ of Error and Assignment of Errors.*

In the Circuit Court of the United States, Northern District of Illinois, Eastern Division. At Law.

WILMINGTON STAR MINING COMPANY, Defendant, Plaintiff in Error,
vs.
MINNIE FULTON, Plaintiff, Defendant in Error.

Petition for Writ of Error.

And now comes Wilmington Star Mining Company, defendant herein, and says that on the first day of August, A. D. 1905, the said Circuit Court of the United States entered a judgment herein in favor of the plaintiff and against this defendant, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendantprays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so comlained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

HOLT, WHEELER & SIDLEY,
Attorneys for Defendant,
Plaintiff in Error.

176 UNITED STATES OF AMERICA,
Northern District of Illinois,
Eastern Division thereof, ss:

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

MINNIE FULTON, Plaintiff, Defendant in Error,
vs.
WILMINGTON STAR MINING COMPANY, Defendant, Plaintiff in Error.

And now comes Wilmington Star Mining Company, by Holt, Wheeler & Sidley, its attorneys, and shows to the Court that in the record and proceedings of the Circuit Court of the United States in this cause and in the rendition of final judgment in said cause in favor of the plaintiff therein, there is manifest error in the following among other things, to-wit:

1. Said Court erred in overruling defendant's objection to the reading of the following question propounded by plaintiff's counsel to Leopold Schmitz, a witness on behalf of plaintiff, whose deposition was read in evidence upon said trial, to-wit:

"Q. While you and Wilson and Fulton were at the bottom of the shaft before you pushed the car, did Wilson tell Fulton or you to wait until the gas was out?"

And in permitting the reading of the said witness' answer to said question, to-wit:

"A. No."

2. Said Court erred in overruling defendant's objection to the reading of the following question propounded by plaintiff's counsel to said witness Schmitz in the course of his said deposition, to wit:

177 "Q. What did Wilson say to Fulton?"

And in permitting the reading of the following answer of said witness to said question, to-wit:

"A. Boss no tell to wait, but told to go."

3. Said Court erred in overruling defendant's objection to the reading of the following question propounded by plaintiff's counsel to said witness Schmitz in the course of his said deposition, to-wit:

"Q. State whether or not Wilson, the boss, said anything else to you and Fulton except to go.

"Q. What statement, if any, was made to Fulton by Wilson?

And in permitting the reading of the answer of said witness Schmitz to said questions as follows:

"A. Just tell me to go, that all."

4. Said Court erred in overruling the motion of defendant's counsel made at the close of all the evidence offered or received upon the trial of this cause, that the Court instruct the jury to find the defendant not guilty, which motion was in writing and in the words following, to-wit:

"MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

"Now comes the defendant, by Holt, Wheeler & Sidley, its attorneys, at the close of all the evidence offered in this cause and moves the Court to instruct the jury to find the defendant not guilty.

HOLT, WHEELER & SIDLEY,
Attorneys for the Defendant."

178 Said motion should have been granted and said instruction given to the jury for the following reasons with others, each of which is hereby separately assigned as a ground of error herein:

First. That the evidence introduced upon the trial of this cause wholly failed to support any of the counts of the declaration.

Second. The evidence introduced upon the trial of this cause showed conclusively either that Samuel Fulton, the deceased, went into the west entry of the mine where he was killed by direction of the mine manager Wilson, which direction thereby became the proximate cause of his death, or else that said deceased entered said west entry under circumstances which amounted to a wilful act on

his part whereby the lives and health of persons working in the mine and the security of the mine or its machinery became endangered, and in either of these cases the plaintiff was barred from a recovery herein.

Third. That none of the counts in the declaration state a cause of action against the defendant.

Fourth. That the provisions of the Illinois Mining Act upon which each and every of the counts in the declaration is based are contrary to the 14th amendment of the Constitution of the United States, to the effect that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

5. Said Court erred in its ruling that no contributory negligence on the part of the deceased, Samuel Fulton, would defeat the plaintiff's right to recover herein thereby excluding gross contributory negligence by said decedent as a defense as shown by the following portion of the charge of said Court to the jury, towit:

179 "The jury are further instructed that if you find from all the evidence and under the instructions of the Court that the defendant wilfully violated any of the provisions of the laws of the State of Illinois as charged in one or more of the counts of the plaintiff's declaration herein, and if such act or omission on the part of the defendant was the direct or proximate cause of the death of Samuel Fulton, then no contributory negligence, if any, on the part of the deceased, will defeat the plaintiff's right to recover herein, and you should find the defendant guilty."

6. Said Court erred in its ruling in the course of its definition to the jury of proximate cause, that if the presence of gas in the mine was necessary to the death of the deceased, Samuel Fulton, then the direction of the mine manager Wilson to such deceased to go into the west roadway of the mine would not be the proximate cause of his death, as shown by the following portion of the charge of the Court to the jury, to-wit:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff can not recover in this case, and the verdict should be for the defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must determine whether, first, if there was gas there at that time; and whether if there was, that was or was not the proximate cause of his death. Now by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there, the thing

180 which caused his death; which was the greater cause? That is a question of fact for you to determine."

7. Said Court erred in its ruling that the question of the proximate cause of Fulton's death turned upon the presence of gas in the mine and the necessity of such presence for Fulton's death, as shown in the following statement made by the Court in connection with that portion of its charge last above set forth; "I said it was for them to determine what was the proximate cause if there was an order for this deceased to go into the mine, or whether it was the gas being there. Let the instruction be what I stated now, the last time; that covers it."

8. Said court erred in its ruling that the defendant was bound by the act of any of its agents or servants in respect to the matters complained of in this suit as shown by the following portion of the foregoing charge of the Court to the jury:

"The defendant in this case is a corporation, and therefore can only act by and through its officers, agents or employees; and you are instructed, that any act or omission of any of its said officers, agents or employees done or omitted in the usual manner and course of their employment, and in the scope of their duties as such officers, agents or employees was the act or omission of the defendant; and if the jury find from all the evidence and under the instructions of the Court such officers, agents or employees, or any of them, acting in the usual and ordinary course of their employment, and in the scope of their duties, did wilfully and knowingly fail to comply with the provisions of the said Statute of Illinois declared upon in any count in the plaintiff's declaration, and such wilful failure to comply with the law as aforesaid is the proximate cause of the death of the deceased husband, Samuel Fulton, then you should find the issue for the plaintiff."

9. Said Court erred in its ruling that the defendant would
181 be liable in this suit for the act of any agent or representative other than the officers of the defendant as shown by the following statement of the Court made in connection with that portion of its charge last above set forth, "I will amend that by saying any agent, employee or whatever word to indicate officer, agent or employee; that is, the representative who has power to do the business of the defendant."

10. Said Court erred in its ruling that the jury should find the issues for the plaintiff if they found from all the evidence and under the instructions of the Court that the defendant's mine manager or mine examiner, acting in the usual and ordinary course of their employment in the scope of their duties, did wilfully and knowingly fail to comply with the provisions of the Statute of Illinois declared upon in any count in the plaintiff's declaration, and such wilful failure to comply with the law, as aforesaid, was the proximate cause of the death of the deceased husband, Samuel Fulton, as shown by the following statement made by the Court in its charge to the jury in connection with and in reference to that portion of its charge to the jury hereinabove set forth under the 8th assignment of error, and its amendment of such portion of such charge hereinabove set forth under the 9th assignment of error:

"That is limited to the superiors,—it is limited to the mine manager and the mine examiner."

11. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

182 12. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

13. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

14. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fourth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

15. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

183 16. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

17. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the seventh of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

18. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

19. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which the action proceeds, for the reason that the Illinois Mining Act upon which said count is based, imposes no liability upon the defendant for the violation of the Act therein complained of."

20. Said Court erred in refusing the request of defendant's
184 counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based, imposes no liability upon the defendant for the violation of the Act therein complained of."

21. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based, imposes no liability upon the defendant for the violation of the Act therein complained of."

22. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fourth of the eight counts of her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based, imposes no liability upon the defendant for the violation of the Act therein complained of."

23. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of."

24. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover
185 under the sixth of the eight counts of her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based imposes no liability upon the defendant for the violation of the Act therein complained of."

25. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the seventh of the eight counts or her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based, imposes no liability upon the defendant for the violation of the Act therein complained of."

26. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which the action proceeds; for the reason that the Illinois Mining Act upon which said count is based, imposes no liability upon the defendant for the violation of the Act therein complained of."

27. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

28. Said Court ered in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

186 29. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

30. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fourth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

31. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eighth counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

32. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

33. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the seventh of the eight counts of her declaration upon which
187 this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

34. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based, are contrary to the Constitution of the United States."

35. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the death of Samuel Fulton resulted in part from his own gross negligence in view of his surroundings and his knowledge of the conditions existing in the mine as disclosed by the evidence, then you are instructed that the plaintiff cannot recover herein."

36. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"You are instructed that under the laws of this State in force at the time of Samuel Fulton's death it was unlawful for any miner or other workman in a mine to do any wilful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof was endangered, and such unlawful act was punishable by a fine not exceeding $500, or by imprisonment in the County jail for a period not exceeding six months, or both, at the discretion of the Court. You are further instructed that if you believe from the evidence that Samuel Fulton at the time he was killed, was engaged in a wilful act which endangered the lives or health of persons working in the mine with him or the security of the mine or its machinery, and that such wilful act on his part con-
188 tributed to his death, then the plaintiff cannot recover in this action and your verdict must be for the defendant.

37. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the death of Samuel Fulton resulted in part from his reckless disregard of consequences in view of his surroundings and knowledge of the conditions existing in the mine as disclosed by the evidence, then you are instructed that the plaintiff cannot recover herein."

38. Said Court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the decedent Fulton just before the time of his death entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant "not guilty," even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

39. Said Court erred in overruling the motion in arrest of judgment requested by counsel for the defendant, it appearing upon the face of the record that no cause of action against the defendant was stated in the declaration filed herein.

40. Said Court erred in rendering judgment in this cause against the defendant in the following respects with others, each of which is hereby assigned as a ground of error herein:

First. There is no evidence in the record of this cause sustaining the declaration or any of its counts.

Second. It conclusively appears from the evidence introduced upon the trial of this cause either that the deceased, Samuel Fulton, entered the west entry of the mine where he was killed, by direction of the mine manager Wilson, which direction thereby be-
189 came the proximate cause of Fulton's death, or, that Fulton entered the said west entry under such circumstances as amounted to a wilful act on his part whereby the lives and health of persons working in the mine and the security of the mine or its machinery became endangered, in either of which cases the plaintiff was barred from recovery herein.

Third. The declaration fails to state any cause of action against the defendant.

Fourth. The provisions of the Illinois Mining Act upon which each and every of the counts in the declaration is based are contrary to the 14th amendment of the Constitution of the United States, to the effect that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

41. Said Court erred in directing the computing of interest upon the verdict of the jury from the date of its rendition, and the inclusion of such interest in the judgment rendered.

Wherefore the said defendant, Wilmington Star Mining Company, prays that the judgment of the Circuit Court may be reversed.

HOLT, WHEELER & SIDLEY,
Attorneys for said Defendant, Plaintiff in Error.

(Endorsed:) Filed Sep. 29, 1905. Marshall E. Sampsell, Clerk.

190 And on to-wit: the twenty-ninth day of September, being one of the days of the regular July term of said Court, 1905, in the record of proceedings thereof in said entitled cause before the Hon. Solomon H. Bethea, District Judge, appears the following entry to-wit:

Order of September 29, 1905.

Allowing Writ of Error.

Law. 26244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING CO.

Now on this day comes the defendant by Messrs. Holt, Wheeler & Sidley, its attorneys, and presents its petition for a writ of error to the Supreme Court of the United States with its assignment of errors and bond on writ of error in the sum of Five Thousand Dollars ($5000.) with Milford D. Buchanan, Gordon Buchanan and Dewitt W. Buchanan as sureties, which bond is approved by the Court and ordered to operate as a supersedeas; and it now appearing to the Court that said defendant had duly complied with the rules of the Supreme Court of the United States and of this Court, it is ordered that said writ of error be, and the same is hereby, allowed to have reviewed in the said Supreme Court of the United States the judgment heretofore entered herein, and that a writ of citation issue returnable within thirty days.

191 And on the same day to-wit: the twenty-ninth day of September, 1905, there was filed in the clerk's office of said Court in said entitled cause a certain Bond on Writ of Error in words and figures following to-wit:

192 Know all men by these presents, That we, Wilmington Star Mining Company, a corporation organized and existing under the laws of the State of Wisconsin, as principal, and Milford D. Buchanan, Gordon Buchanan and Dewitt W. Buchanan, of Chicago, Cook County, Illinois, are held and firmly bound unto Minnie Fulton, of Coal City, Grundy County , Illinois, in the full and just sum of Five Thousand Dollars, to be paid to the said Minnie Fulton, or her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 5th day of August in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a session of the Circuit Court of the United States for the Northern District of Illinois, in a suit pending in said Court, between said Minnie Fulton, plaintiff, and said Wilmington

Star Mining Company, defendant, a judgment was rendered against the said Wilmington Star Mining Company, and the said Wilmington Star Mining Company, having obtained from said Court a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Minnie Fulton, citing and admonishing her to be and appear at the United States Supreme Court, to be holden at Washington, District of Columbia, within thirty days from the date hereof.

Now, the condition of the above obligation is such, That if the said Wilmington Star Mining Company, shall prosecute its writ to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] WILMINGTON STAR MINING COMPANY,
By M. D. BUCHANAN, *President.*
MILFORD D. BUCHANAN. [SEAL.]
GORDON BUCHANAN. [SEAL.]
DE WITT W. BUCHANAN. [SEAL.]

Attest:
D. W. BUCHANAN, *Sec'y.*

Sealed and delivered in presence of
MARK A. FOOTE.
T. D. JORDAN.
C. L. MALLORY.

Approved by—
S. H. BETHEA, *Judge.*

(Endorsed:) Filed Sep-. 29, 1905, Marshall E. Sampsell, Clerk.

193 *Præcipe for Record.*

In the Circuit Court of the United States for the Northern District of Illinois, Eastern Division.

36244.

MINNIE FULTON
vs.
WILMINGTON STAR MINING COMPANY.

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the clerk of the Supreme Court of the United States, under the writ of error heretofore allowed by said Court and include in the said transcript the following pleadings, proceedings and papers on file to-wit:

Transcript of Record from Grundy County Circuit Court, (omitting therefrom the three last counts of the orginal declaration).

Order of October 6, 1902 amending declaration.
Order of October 24, 1902, sustaining demurrer with leave to Plaintiff to amend declaration in five days.
Additional Count filed October 28, 1902.
Plea filed October 30, 1902.
Order of Oct. 30, 1902.
Order of Nov. 5, 1902, Leave given to file additional count as of October 28, 1902, etc.
Order of Nov. 14, 1902.
Seventh Additional Count filed Nov. 14, 1902.
Order of Nov. 22, 1902, extending time for defendant to plead to Additional Counts.
Order of Dec. 30, 1902.
194 Second amended first additional Count and Amended fifth and sixth additional counts.
Plea to second amended first additional count and amended fifth and sixth additional counts.
Stipulation filed January 19, 1903.
Order of March 27, 1905, cause called for trial and jury sworn.
Order of March 28, 1905.
Motion of Defendant to direct verdict.
Orders of March 29 and 30.
Judgment of August 1, 1905.
Order of August 16, 1905, extending time to perfect Writ of Error.
Bill of Exceptions.
Petition for Writ of Error and Assignment of Errors, filed Sept. 29, 1905.
Order of Sept. 29, 1905, allowing Writ of Error.
Bond on Writ of Error filed Sep. 29, 1905.
Said transcript to be prepare- as required by law and the rules of this Court and the rules of the Supreme Court of the United States and on file in the office of the clerk of the said Supreme Court of the United States, at Washington, before October 29, 1905.

HOLT, WHEELER & SIDLEY,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed Oct. 9, 1905, Marshall E. Sampsell, Clerk.

195 NORTHERN DISTRICT OF ILLINOIS, *Eastern Division*, *ss:*

I, Marshall E. Sampsell, Clerk of the Circuit Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record in said Court and made in accordance with Præcipe filed in the cause entitled Minnie Fulton, Plaintiff *vs.* Wilmington Star Mining Company, Defendant, General Number 26,244, as the same appear from the original records and files of said Court now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, in said District this twelfth day of October, 1905.

[Seal Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL, *Clerk.*

196 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, between Minnie Fulton, Plaintiff *vs.* Wilmington Star Mining Company, Defendant, a manifest error hath happened, to the great damage of the said Wilmington Star Mining Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of September, in the year of our Lord one thousand nine hundred and five.

[Seal Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk of the Circuit Court of the United States
for the Northern Dist. of Illinois.

Allowed by
SOLOMON H. BETHEA,
District Judge.

[Endorsed:] 26244. Supreme Court of the United States. Wilmington Star Mining Co. *vs.* Minnie Fulton. Writ of Error. Filed Sept. 29, 1905. Marshall E. Sampsell, Clerk. Copy deposited for the defendant in error in the Clerk's Office, U. S. Circuit Court, Northern District of Illinois.

197 UNITED STATES OF AMERICA, *ss:*

To Minnie Fulton, Greeting:

You are hereby cited and admonished to be and appear at a S preme Court of the United States, at Washington, within 30 da from the date hereof, pursuant to a Writ of Error, filed in t Clerk's Office of the Circuit Court of the United States for the Nort ern District of Illinois, wherein Wilmington Star Mining Compan is the Plaintiff in error and you are Defendant, to show cause, if a there be, why the judgment rendered against the said Plaintiff as the said Writ mentioned, should not be corrected, and why spee justice should not be done to the parties in that behalf.

Witness, the Honorable Solomon H. Bethea, District Judge t 29th day of September, in the year of our Lord one thousand ni hundred and five.

S. H. BETHEA, *Judge.* [SEAL.]

198 We hereby accep service of the within writ.

EDDY, HALEY & WETTEN,
Attorneys for Minnie Fulton.

Oct. 4, 1905.

[Endorsed:] No. 26244. Supreme Court of the United Stat Minnie Fulton *vs.* Wilmington Star Min'g Co. Citation to the S preme Court of the United States. Circuit Court of the Unit States, Northern District of Illinois, Eastern Division. Filed O 6, 1905. Marshall E. Sampsell, Clerk.

Endorsed on cover: File No. 19,945. N. Illinois C. C. U. Term No. 139. Wilmington Star Mining Company, Plaintiff Error, *vs.* Minnie Fulton. Filed October 26th, 1905. File N 19,945.

FILE COPY.

Office Supreme Court,
FILED.
NOV 5 190
JAMES H. McKEN

No. 139.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,

vs.

MINNIE FULTON,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument for Plaintiff in Error

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINTERS, CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D., 1906.

No. 139.

WILMINGTON STAR MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

MINNIE FULTON,
DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief and Argument for Plaintiff in Error.

MAY IT PLEASE THE COURT:

The question arising upon the record in this case, which brings it directly to this court for review, relates to the constitutionality of the Illinois Mining Act of 1899 which renders the owner or operator of a coal mine liable in damages for personal injuries resulting from the wilful act of an employe, viz: the mine manager or mine examiner, notwithstanding other provisions of the same act impose the duty, whose violation has caused the

injury, exclusively and in express terms and under penalties of fine and imprisonment, upon such mine manager or mine examiner, and then require his employment by the mine owner under pain of similar punishment in case of disobedience. The act in question is set out in full as an Appendix to this argument.

The Supreme Court of Illinois in *Henrietta Coal Co.* v. *Martin,* 221 Ill., 460, and other cases cited therein has construed this Act as imposing liability upon the owner of the mine under the circumstances above noted, and while we believe that a simple reading of the Act plainly indicates that it was the intention of the Legislature to commit to the inspectors, mine managers, mine examiners and hoisting engineers, whose duties it prescribes, and for whose competency the board of examiners which it created is to vouch, the interior management and control of the mine and to hold them severally liable, both civilly and criminally, for any wilful violation of such duties, we must accept, as final, the interpretation placed upon the Act by the highest court of the state. As thus construed, however, the Act is in violation of the Fourteenth Amendment of the Constitution of the United States, forbidding a state to make or enforce any law which shall abridge the privileges or immunities of any citizen of the United States, or to deprive any person of life, liberty or property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

The facts in this case upon which the action is predicated, are, briefly, as follows:

Samuel Fulton, husband of defendant in error, and a track layer in the employ of plaintiff in error at its mine near Coal City, in Grundy County, Illinois, descended the mine with other employes one Sunday morning when the mine was not in operation, for the purpose of laying switch tracks in the west roadway, so-called, in preparation for the work of the regular miners on the following day. Both the mine manager and the mine examiner accompanied Fulton into the mine. The west roadway generated gas at all times, a fact well known to the mine manager and mine examiner, and all other employes of the mine; and a fan had been installed at the entrance of this roadway as required by law for the purpose of driving air into it and thus insuring the safety of the employes therein. This fan was ample for the purposes designed.

When the men entered the mine this Sunday morning the fan was not in operation and had not been since the preceding day and in consequence the west roadway was filled with gas, facts known to all present in the mine. A brief delay in starting the fan was caused by the absence of a monkey-wrench which was customarily used to open the valve in a steam pipe connected with the fan. As soon as Wilson, the mine manager, had procured another one from the top of the shaft all the men assisted in starting the fan and shortly after it was started and before it had cleared the gas out of the west roadway Fulton and another employe named Schmitz entered this roadway for the purpose of laying switch tracks, carrying open miners' lamps upon their heads. They encountered the gas in the road-

way, an explosion occurred and Fulton was killed, his companion, Schmitz, escaping with serious injuries.

Defendant in error brought suit under Section 33 of the Illinois Mining Act against the owner of the mine, charging eight separate wilful violations of the Act in as many counts. The violations charged, all of which related to duties imposed by the Act upon the mine manager or mine examiner, not upon the owner or operator, are as follows, the page references being to the printed transcript of record:

First Count. (p. 4.) This count is based upon one of the provisions of Section 19 which defines in greater detail than is given in the preceding sections the nature and amount of ventilation which the *mine examiner* shall see "is traveling in its proper course and proper quantity" (Sec. 18 (a)), and the *mine manager* shall measure and otherwise supervise (Sec. 16 (b) and (c)). The trial judge in his instructions placed this duty upon the mine manager. (Rec., 96.)

Second and Third Counts. (pp. 5, 6.) These counts are based on Sec. 16 (b), "It shall be the duty of the *mine manager* to see that cross cuts are made at proper distances apart to secure the best ventilation at the face of all working places and that all stoppings along air ways are properly and promptly built."

Fourth Count. (p. 16.) See Sec. 18 (a) requiring *the mine examiner* to "inspect all places where men are expected to pass or to work and observe whether there are any * * * accumulations of gas" therein.

FIFTH COUNT. (p. 19.) See Sec. 18 (b) prescribing, with other duties of the *mine examiner,* "No one shall be allowed * * * to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe."

SIXTH COUNT. (p. 22.) See Sec. 16 (b). The *mine manager* "shall keep careful watch over all ventilating apparatus and the air currents in the mine and in case of accident to fan or machinery by which the currents are obstructed or stopped he shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established."

SEVENTH COUNT. (p. 23.) The Act nowhere requires the owner of the mine to *cause its mine examiner* to visit the mine before the men are permitted to enter it and to see that the air current is traveling in its proper course and in proper quantity. Such a duty is imposed, however, upon the *mine examiner* by Sec. 18 (a) and in so far, if at all, as this count states a statutory cause of action, it is based on this provision.

EIGHTH COUNT. (p. 24.) See Sec. 18 (b). The *mine examiner,* when working places are discovered in which accumulations of gas exist, "shall place a conspicuous mark thereat as notice to all men to keep out."

The question of unconstitutionality was raised upon the trial in various ways—by motion made at the close of all the evidence to instruct the jury to find for the defendant upon the ground, with others,

that the provisions of the Illinois Mining Act upon which the action and each of the counts is based, are contrary to the Fourteenth Amendment of the Constitution of the United States (p. 92); by exception to the court's charge to the jury that any act or omission of the mine manager or mine examiner was the act or omission of the defendant, and that if the jury found from the evidence that such mine manager or mine examiner acting in the usual and ordinary course of his employment and in the scope of his duties, did wilfully and knowingly fail to comply with the provisions of said statute declared upon in any count in the plaintiff's declaration and such wilful failure to comply with the law as aforesaid was the proximate cause of decedent's death, they should find the issue for the plaintiff (pp. 101-2); by requesting instructions as to each of the eight counts of the declaration that no recovery could be had thereunder for the reason that the provisions of the Illinois Mining Act upon which such count was based were contrary to said Constitution (pp. 105-6); by motion in arrest of judgment (p. 108). In each instance proper exception to the court's adverse ruling was preserved, and error assigned thereon.

Other errors complained of and hereinafter presented for the court's consideration in case it should rule adversely to our contention upon the constitutional question, are as follows:

1. The court erred in its instruction to the jury that the question whether Wilson's order to Fulton to enter the west roadway was the proximate cause of his death turned upon the further questions whether there was gas there at the time and whether

such gas was necessary to his death. This question was raised by exception to the court's charge upon this point. (Rec., 101.) (See Assignments of Error, 6 and 7.)

2. The undisputed evidence shows that Fulton entered the west roadway, where he met his death and where he knew at the time that gas existed, either as the result of an order from the mine manager, Wilson, to enter this roadway, or upon his own initiative and under circumstances which amounted to a willful act on his part, whereby the lives and health of persons working in the mine and the security of the mine or its machinery became endangered; an act forbidden by Section 31 of the statute. If he entered by reason of Wilson's order, then such order was the proximate cause of his death. If he entered willfully, then his action was in violation of the statute. In either case plaintiff was barred from a recovery herein upon familiar principles of law. This question was raised by defendant's motion to instruct the jury to find for the defendant, made at the close of all the evidence (Rec., 92), and also by exception to the entry of judgment herein. (Rec., 108.) (See Assignment of Errors, 4 and 40.)

3. The evidence strongly indicated that the circumstances under which the decedent, Fulton, entered the west roadway constituted a willful act, forbidden by Section 31 of the statute, and that such willful act contributed to his death, or at least that his death resulted in part from his reckless disregard of consequences in view of his known surroundings, etc. Defendant was entitled to instructions denying its liability if such facts were established.

Its requests for such instructions were, however, denied by the court. (Rec., 107.) (See Assignments of Error, 36 and 37.)

4. No evidence was introduced in support of defendant's liability as charged in the second and third counts, the undisputed evidence showing that this was a "long-wall mine," so-called, and that crosscuts and stoppings are unknown in such mines. Defendant's motion to strike out these counts and request for instructions to the jury that no recovery could be had thereunder should have been granted. (Rec., 61, 102.) (See Assignments of Error, 12 and 13.)

5. There was uncontradicted evidence that Fulton had entered the mine to work therein on the morning in question under the direction of the mine manager, Wilson. Defendant was entitled to an instruction denying its liability, under Section 18 (b) of the Act, in case such fact was established. The court refused, however, to give to the jury the requested charge upon that point. (Rec., 107.) (See Assignment of Error 38.)

There was, in any event, no basis in the evidence for the liability charged in the fifth count, and defendant's motion to strike out and request for an instruction that no recovery could be had thereunder should have been granted. (Rec., 61, 103.) (See Assignment of Error, 15.)

6. No evidence was introduced of any accident to fan or machinery whereby the air currents in the mine became obstructed and stopped, as charged in plaintiff's sixth count. Defendant's motion to strike

out and request for an instruction that no recovery could be had under said count should have been granted. (Rec., 61, 103.) (See Assignment of Error 16.)

ERRORS RELIED UPON.

4. Said court erred in overruling the motion of defendant's counsel, made at the close of all the evidence offered or received upon the trial of this cause, that the court instruct the jury to find the defendant not guilty, which motion was in writing and in the words following, to wit:

"MINNIE FULTON

vs.

WILMINGTON STAR MINING COMPANY.

"Now comes the defendant, by Holt, Wheeler & Sidley, its attorneys, at the close of all the evidence offered in this cause, and moves the court to instruct the jury to find the defendant not guilty.

HOLT, WHEELER & SIDLEY,
Attorneys for the Defendant."

Said motion should have been granted and said instruction given to the jury for the following reasons, with others, each of which is hereby separately assigned as a ground of error herein:

First. That the evidence introduced upon the trial of this cause wholly failed to support any of the counts of the declaration.

Second. The evidence introduced upon the trial of this cause showed conclusively either that Samuel Fulton, the deceased, went into the west entry of the mine where he was killed by direction of the mine manager, Wilson, which direction thereby became the proximate cause of his death, or else that said deceased entered said west entry under circumstances which amounted to a willful act on his part, whereby the lives and health of persons working in the mine and security of the mine or its machinery became endangered, and in either of these cases the plaintiff was barred from a recovery herein.

Third. That none of the counts in the declaration state a cause of action against the defendant.

Fourth. That the provisions of the Illinois Mining Act upon which each and every of the counts in the declaration is based are contrary to the Fourteenth Amendment of the Constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

6. Said court erred in its ruling in the course of its definition to the jury of proximate cause, that if the presence of gas in the mine was necessary to the death of the deceased, Samuel Fulton, then the direction of the mine manager, Wilson, to such deceased to go into the west roadway of the mine would not be the proximate cause of his death, as shown by the

following portion of the charge of the court to the jury, to wit:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must determine whether, first, if there was gas there at that time; and whether, if there was, that was or was not the proximate cause of his death. Now, by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was one, their willfully sending him there, the thing which caused his death, which was the greater cause? That is a question of fact for you to determine."

7. Said court erred in its ruling that the question of proximate cause of Fulton's death turned upon the presence of gas in the mine and the necessity of such presence for Fulton's death, as shown in the following statement made by the court in connection with that portion of its charge last above set forth: "I said it was for them to determine what was the proximate cause if there was an order for this deceased to go into the mine, or whether it was the gas

being there. Let the instruction be what I stated now, the last time; that covers it."

8. Said court erred in its ruling that the defendant was bound by the act of any of its agents or servants in respect to the matters complained of in this suit, as shown by the following portion of the foregoing charge of the court to the jury:

"The defendant in this case is a corporation, and therefore can only act by and through its officers, agents or employes; and you are instructed that any act or omission of any of its said officers, agents or employes done or omitted in the usual manner and course of their employment, and in the scope of their duties as such officers, agents or employes was the act or omission of the defendant; and if the jury find from all the evidence and under the instructions of the court such officers, agents or employes, or any of them, acting in the usual and ordinary course of their employment, and in the scope of their duties, did willfully and knowingly fail to comply with the provisions of the said statute of Illinois declared upon in any count in the plaintiff's declaration, and such willful failure to comply with the law as aforesaid is the proximate cause of the death of the deceased husband, Samuel Fulton, then you should find the issue for the plaintiff."

9. Said court erred in its ruling that the defendant would be liable in this suit for the act of any agent or representative other than the officers of the defendant, as shown by the following statement of the court made in connection with that portion of its charge last above set forth: "I will amend that by saying any agent, employe or whatever word to

indicate officer, agent or employe; that is, the representative who has power to do the business of the defendant."

10. Said court erred in its ruling that the jury should find the issues for the plaintiff if they found from all the evidence, and under the instructions of the court that the defendant's mine manager or mine examiner, acting in the usual and ordinary course of their employment in the scope of their duties, did willfully and knowingly fail to comply with the provisions of the statute of Illinois declared upon in any count in the plaintiff's declaration, and such willful failure to comply with the law, as aforesaid, was the proximate cause of the death of the deceased husband, Samuel Fulton, as shown by the following statement made by the court in its charge to the jury in connection with and in reference to that portion of its charge to the jury hereinabove set forth under the eighth assignment of error, and its amendment of such portion of such charge hereinabove set forth under the ninth assignment of error:

"That is limited to the superiors; it is limited to the mine manager and the mine examiner."

12. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon

the trial of this cause in support of the defendant's liability as charged in said count.

13. Said court erred in refusing the request of the defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

15. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability, as charged in said count.

16. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds."

Said instruction should have been given, for the reason that there was no evidence introduced upon the trial of this cause in support of the defendant's liability as charged in said count.

27. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the first of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

28. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the second of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

29. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the third of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

30. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fourth of the eight counts of her

declaration upon which this action proceeds, for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

31. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the fifth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

32. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the sixth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

33. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the seventh of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

34. Said court erred in refusing the request of

defendant's counsel to further charge the jury as follows:

"The jury are instructed that the plaintiff cannot recover under the eighth of the eight counts of her declaration upon which this action proceeds; for the reason that the provisions of the Illinois Mining Act upon which said count is based are contrary to the Constitution of the United States."

36. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"You are instructed that under the laws of this state in force at the time of Samuel Fulton's death it was unlawful for any miner or other workman in a mine to do any willful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof was endangered, and such unlawful act was punishable by a fine not exceeding $500, or by imprisonment in the county jail for a period not exceeding six months, or both, at the discretion of the court. You are further instructed that if you believe from the evidence that Samuel Fulton at the time he was killed, was engaged in a wilful act which endangered the lives or health of persons working in the mine with him or the security of the mine or its machinery, and that such wilful act on his part contributed to his death, then the plaintiff cannot recover in this action and your verdict must be for the defendant.

37. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the death of Samuel Fulton resulted in part from his reckless disregard of consequences in view of his surroundings and knowledge of the conditions existing in the mine as disclosed by the evidence, then you are instructed that the plaintiff cannot recover herein."

38. Said court erred in refusing the request of defendant's counsel to further charge the jury as follows:

"If you believe from the evidence that the decedent Fulton just before the time of his death entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

39. Said court erred in overruling the motion in arrest of judgment requested by counsel for the defendant, it appearing upon the face of the record that no cause of action against the defendant was stated in the declaration filed herein.

40. Said court erred in rendering judgment in this cause against the defendant in the following respects with others, each of which is hereby assigned as a ground of error herein:

First. There is no evidence in the record of this cause sustaining the declaration or any of its counts.

Second. It conclusively appears from the evidence introduced upon the trial of this cause either that the deceased, Samuel Fulton, entered the west entry of the mine, where he was killed, by direction

of the mine manager, Wilson, which direction thereby became the proximate cause of Fulton's death, or, that Fulton entered the said west entry under such circumstances as amounted to a wilful act on his part whereby the lives and health of persons working in the mine and the security of the mine or its machinery became endangered, in either of which cases the plaintiff was barred from recovery herein.

Third. The declaration fails to state any cause of action against the defendant.

Fourth. The provisions of the Illinois Mining Act, upon which each and every of the counts in the declaration is based, are contrary to the fourteenth amendment of the constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

BRIEF OF ARGUMENT.

I.

The Supreme Court of Illinois has interpreted the Mining Act of this state, passed in 1899, as rendering the mine owner or operator liable in damages for death or injury resulting from the violation by any mine official, *i. e.*, the mine manager, hoisting engineer or mine examiner, of any duty imposed by the Act upon such official. See *Henrietta Coal Co.* v. *Martin*, 221 Ill., 460, and cases cited therein. Such interpretation by the highest court of the State is final and conclusive as to the meaning of the Act.

Backus v. *Fort Street Union Depot Co.*, 169 U. S., at 566.

II.

As thus interpreted, the Act is in contravention of the Fourteenth Amendment for the following reasons:

(a) It destroys the relationship between the owner and mine official upon which the doctrine of *respondeat superior* is based, by compelling the official's employment under penalty and then directly imposing duties upon him instead of permitting their delegation by the employer. (See Appendix and summary of statute under I of argument.) To hold the owner of the mine liable under such cir-

cumstances for the officials' defaults is to make one man answerable for the acts of another over whom he has no control and thereby to deny to him inherent and inalienable rights and abridge his privileges and immunities as a citizen of the United States.

Durkin v. *Kingston Coal Co.*, 171 Pa. St., 193.

Williams v. *Thacker Coal & Coke Co.*, 40 L. R. A., 812.

Redstone Coke Co. v. *Roby*, 115 Pa. St., 368.

Colorado Coal & Iron Co. v. *Lamb*, 6 Colo. App., 205.

Fulton v. *Wilmington Star Mining Co.*, 133 Fed. Rep., at 198.

(b) No recognized principle of law permits an employer to be held liable for the acts of a compulsory servant.

14 Am. & Eng. Enc. of Law, (1st Ed.), 809.

20 Am. & Eng. Enc. of Law, (2nd Ed.), 180.

Reno Employers Liability Acts, 33.

James v. *San Francisco*, 6 Cal., 528.

Frazier v. *Railroad Co.*, 180 Mass., 427.

Homer Ramsdell Co. v. *La Compagnie, etc.*, 182 U. S., 406.

Carruthers v. *Sydebotham*, 4 M. & S., 85.

Crisp v. *U. S. etc., Co.*, 124 Fed. Rep., 748.

Harrison v. *Hughes*, 125 Fed. Rep., 860.

(c) The Act, by fixing upon the mine owner a civil liability not imposed upon other employers of labor in Illinois, whereby his property may be taken to pay for a stranger's defaults, deprives him of

liberty and property without due process of law, and denies to him the equal protection of the laws.

Millett v. *The People,* 117 Ill., 301.

Cooley Const. Lim. (1st Ed.), 352-3, 391, 393.

Van Zandt v. *Waddell,* 2 Yerger, 269.

Wally's Heirs v. *Kennedy,* 2 Yerger, 554.

A., T. & St. F. Ry. Co. v. *Matthews,* 174 U. S., 104-5.

G., C. & St. F. Ry. Co. v. *Ellis,* 165 U. S., 154.

The fact that the Illinois Mining Act may be regarded as a police measure does not prevent the application of the constitutional guaranty in question.

Connelly v. *Union Sewer Pipe Co.,* 184 U. S., 558.

The constitutional provision for the security of person and property should be liberally construed.

Boyd v. *U. S.,* 116 U. S., at 635.

G., C. & St. F. Ry. Co. v. *Ellis,* 165 U. S., at 154.

The Act is wholly void by reason of the unconstitutional provision in question, as it cannot be presumed that its framers would have enacted it without this provision which alone deals with the subject of civil liability for its violation.

Connolly v. *Union Sewer Pipe Co.,* 184 U. S., at 565.

III.

Recovery can be had under this Mining Statute only when the defendant's act complained of is the proximate cause of the injury.

Odin Coal Co. v. *Denman,* 185 Ill., 418.

This statute in derogation of the common law must be strictly construed (see authorities hereinafter cited under VI), and no recovery should be permitted except for a violation of some duty clearly imposed by the Act.

The duty of refraining from ordering miners into gaseous portions of the mine is nowhere laid upon the mine manager. On the contrary Section 18 (b) would seem to clearly negative such a duty.

Defendant was entitled to an accurate instruction by the court to the effect that if the act of Wilson, the mine manager, in ordering decedent into the gaseous part of the mine was found to be the proximate cause of the accident, no recovery could be had against the defendant, and it was error for the court to charge the jury in that connection that the question of proximate cause turned upon whether or not there was gas in the mine which was necessary to his death, and without which his death would not have followed. (Rec., 97-8.) The gas was merely the instrumentality producing death, equally necessary to that result whether Wilson's or decedent's act was the proximate cause of the explosion.

The jury were still further confused upon this important question by the further instruction of the

court that they should take into consideration whether the gas being there or Wilson's order was *the greater cause* of his death. (Rec., 98)—a comparison which had no proper place in the solution of the question.

IV.

The evidence discloses but three possible sets of circumstances under which Fulton could have entered the west roadway in which he met his death and to whichever set of circumstances his death is attributed the defendant is free from liability. These possible circumstances are as follows:

1. Either Wilson, the mine manager, ordered Fulton to enter the roadway and he did so in obedience thereto, or

2. Wilson cautioned him not to enter the roadway until the gas had cleared out under the operation of the fan and Wilson had tetsted the roadway with a safety-lamp and Fulton entered in spite of such warning, or

3. No order or caution was given by Wilson, but Fulton entered the roadway upon his own volition, well knowing, as the evidence discloses, without dispute or contradiction, that there was gas in the roadway which his open lamp would in all likelihood explode.

The evidence supporting these three possible theories is shown in the record as follows:

1. The testimony of Schmitz (Rec., 55-6).

2. The testimony of Wilson (Rec., 66, 73), and Capet's corroborating testimony (Rec., 88).

3. As to Fulton having with him an open light at the time of the explosion, see Rec., 33, 45.

As to Fulton's experience and knowledge of the mine conditions see Rec., 35, 40, 49, 62, 64, 65, 76, 77, 83.

If Fulton entered under command from Wilson (No. 1), such command was the proximate cause of his death, and no recovery can be had upon the grounds already considered.

If Fulton's entry in the west roadway was made in spite of a caution (No. 2), or upon his own volition with knowledge of the conditions producing danger (No. 3), then he was engaged at the time of his death in an unlawful act contrary to the express prohibition of Section 31 of the Mining Act, and such unlawful act having contributed to his death, barred the right of recovery herein.

A willful act, as used in the Mining Statute, means that the person performing the act knows what he is doing and intends to do what he is doing, and is a free agent. An act *consciously* performed is *wilfully* performed under this statute as construed by the Illinois Supreme Court.

> *Odin Coal Co.* v. *Denman,* 185 Ill., 413.
> *Carterville Coal Co.* v. *Abbott,* 181 Ill., at 502.

See further for a construction of the term "wilful", as used in such statutes, *Southern Ry. Co.* v. *Carroll,* 138 Fed. Rep., 638.

The foregoing definition of the term "willful" is that given to the jury on the trial of this case at the request of the plaintiff (Rec., 99), and it must

be equally applicable to the acts of the plaintiff's intestate and of the defendant.

Fulton's act, then, being willful and such as to endanger the lives and health of persons working in the mine and the security of the mine and the machinery therein, as evidenced by the result of the explosion on this occasion, was unlawful within the meaning of Section 31 of the Act. It therefore barred the right of recovery herein. "It is the established law that when a plaintiff's own unlawful act concurs in causing the damage he complains of he cannot recover compensation for such damage."

Heland v. *City of Lowell,* 3 Allen, 407.

"The general principle is undoubted, that courts of justice will not assist a person who has participated in a transaction forbidden by statute to assert rights growing out of it, or to relieve himself from the consequences of his own illegal act. Whether the form of the action is in contract or in tort the test in each case is whether when all the facts are disclosed the action appear to be founded in a violation of law, in which the plaintiff has taken part." Citing many authorities.

Hall v. *Corcoran,* 107 Mass., 253.

As long ago as *Holman* v. *Johnson,* Cowper 343, Lord Mansfield said: "The principal of public policy is this, *Ex dolo malo non oritur actio*—no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

In *Coppell* v. *Hall,* 7 Wallace, 558, this court said:

> "The instruction given to the jury, that if the contract was illegal the legality had been

waived by the reconventional demand of the defendants, was founded upon a misconception of the law. In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden or denounced. The maxim, *ex dolo malo non oritur actio,* is limited by no such qualification."

And again page 559:

"The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

See further *Gilmore* v. *Fuller,* 198 Ill., 130, and authorities cited therein.

V.

There being evidence in the record from which the jury might have found Fulton's action in entering the west roadway to have been willful and unlawful under the statute, it was the defendant's right to have this question submitted to the jury under the form of instruction requested in that connection. (Rec., 107.) The court's refusal to give this instruction was error, upon the authorities cited under IV, *supra.*

Defendant's further request for an instruction along the same line to the effect that no recovery could be had if Fulton's death resulted in part from his own reckless disregard of consequences in view of his surroundings and the conditions in the mine as disclosed by the evidence (Rec., 107), should also

have been given, as such action on his part, if found by the jury, would have amounted to a willful act under the authorities already cited and would have effectually neutralized the effect of any willful act on defendant's part upon the same principle, that ordinary contributory negligence on plaintiff's part is a defense to ordinary negligence on defendant's part.

VI.

Under proper construction of this mining statute no evidence was introduced in support of the second, third, fifth and sixth counts of the declaration and defendant's motion to exclude these counts from consideration, made at the close of plaintiff's case (Rec., 61), or its requests for instructions as to each of said counts that no recovery could be had thereunder (Rec., 102, 103), should have been granted.

Second and Third Counts.

The evidence showed that this was a "long wall" mine, so called, in which "cross-cuts" and "stoppings" are unknown. (Rec., 33, 41-3.) The statute, therefore, had no application in this respect to the mine in question and the evidence relating to the absence of "cross-cuts" and "stoppings" should have been excluded from the jury.

Fifth Count.

The uncontradicted evidence showed that Fulton was in the mine in question under the direction of

defendant's mine manager. (Rec., 55-6, 64, 65.) The charge to the contrary in the fifth count was, therefore, directly negatived and this count should likewise have been eliminated from the case.

Sixth Count.

This count is based upon Section 16 (b). Evidence of the temporary loss of the monkey-wrench, by means of which the fan was customarily started, did not support the allegation that an accident to the mine machinery had occurred by which the currents of air were obstructed or stopped, as there were no air currents in the mine at the time and no danger to the miners resulted from the occurrence testified to. The provision of the statute in question was made to cover the case of accidents occurring while the mine and its ventilating machinery were in operation by which the lives of the miners would be endangered. The Mining Act must be strictly construed, being in derogation of the common law, and cannot be extended to cover the incident in question.

Cole v. *Mayne,* 122 Fed. Rep., 843.

Hamilton v. *Jones,* 125 Ind., 178.

Shaw v. *Railroad Co.,* 101 U. S., at 565.

Johnson v. *Southern Pacific Co.,* 117 Fed. Rep., 466.

ARGUMENT.

I.

THE MINING ACT, IN SO FAR AS IT UNDERTAKES TO RENDER THE OWNER OF THE MINE LIABLE FOR VIOLATIONS OF DUTY IMPOSED BY THE ACT UPON MINE OFFICIALS WHOM THE OWNER IS COMPELLED TO EMPLOY, IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

The Illinois Mining Act of 1899 is a radical departure from all preceding legislation in the state upon the subject, in that it effectually takes from the mine owner the subterranean management of his property and commits it into the hands of inspectors, mine managers, mine examiners and hoisting engineers, whom he must employ, yet whose duties and conduct he cannot prescribe or control, for they are laid down by the state authority, which creates and certifies these officials. Prior to 1899 the mining statutes, while they prescribed in increasing detail the duties of the owner or operator, imposed not a single duty upon inspectors, managers, examiners or hoisting engineers, but left them subject to the direction of the mine owner who employed them, and upon whom was specifically placed the responsibility for the operation of the mine.

With the revision of 1899 came a complete change of policy by the state in providing for the health and safety of miners. The location of the mine, its

material equipment and external supervision, are still left to the operator or owner; for example, he shall make accurate maps (Sec. 1-a) and surveys (1-i); have steam boilers inspected (4-i); provide scales (24-a); station top and bottom men (28-a); maintain lights at shaft (28-b); furnish safety lamps (29-a), etc., etc.; but as to all that concerns the immediate health and safety of the miners while at work in the mine the state inspector, mine manager, mine examiner and hoisting engineer are made directly responsible. That there might be no mistake upon this point, Section 6 (a) of the act states that "for the purpose of securing efficiency in the *mine inspection service* and a high standard of qualification in *those who have the management and operation of coal mines,* the State Commissioners of Labor shall appoint a board of examiners to be known as the State Mining Board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of men seeking appointment as *state inspectors* of mines, and of those seeking certificates of competency as *mine managers,* as *hoisting engineers,* and as *mine examiners.*" In the minds of the legislators who made this revision the mine managers, hoisting engineers and mine examiners are the persons "who have the management and operation of coal mines," whose standard of qualification must be kept high, just as the inspector is the official who has charge of the "mine inspection service" whose efficiency must be secured. The mine owner or operator is not mentioned or referred to in that connection.

Section 7 specifies the character and qualifications which the State requires of candidates for these several positions. Inspectors must produce satisfactory evidence that they are citizens of Illinois, at least thirty years of age, that they have had a practical mining experience of ten years, and that they are men of good repute and temperate habits. They must submit and satisfactorily pass an examination as to their practical and technical knowledge of mining engineering and mining machinery and appliances, of the proper development and operation of coal mines, of ventilation in mines, of the nature and properties of mine gases, of the geology of the coal measures in said State and of the laws of said State relating to coal mines.

Mine managers must produce evidence that they are citizens of Illinois, at least twenty-four years of age; that they have had at least four years' mining experience and are men of good repute and temperate habits, and must satisfactorily pass such an examination as to their experience in mines and in the management of them, their knowledge of mine machinery and appliances, the use of surveying and other instruments, the properties of mine gases, the principles of ventilation and the specific duties and responsibilities of mine managers as the board shall see fit to impose.

Hoisting engineers must produce evidence that they are citizens of the United States, at least twenty-one years of age; that they have had at least two years' experience as fireman or engineer of a hoisting plant and are of good repute and temperate habits. They must satisfactorily pass an examina-

tion as to their experience in handling hoisting machinery and as to their practical and technical knowledge of the construction, cleaning and care of steam boilers, the care and adjustment of hoisting engines, the management and efficiency of pumps, ropes and winding apparatus and the knowledge of the laws of said State in relation to signals, and the hoisting and lowering of men at mines.

Mine examiners must be citizens of Illinois, at least twenty-one years of age and of good repute and temperate habits. They must satisfactorily pass an examination as to their experience in mines generating dangerous gases, their practical and technical knowledge of the nature and properties of fire damp, the laws of ventilation, the structure and uses of the safety lamps, and the laws of Illinois relating to safeguards against fires from any source in the mines.

The foregoing requirements call for a high degree of intelligence, character and experience in those who would serve as inspectors, managers, hoisting engineers and examiners in coal mines. They must, in fact, be specialists in their several vocations, as intelligent and competent at least, and probably much more so, than the average owner or operator who would regulate and control the operations of a mine in the absence of this legislation. See, in this connection, *Williams* v. *Thacker Coal & Coke Co.*, 40 L. R. A., at 812, hereafter quoted.

Section 8 provides for the issuance of certificates of competency to candidates for the positions of mine managers, hoisting engineers and mine exam-

iners, who have successfully passed the examinations, which certificates qualify them to act in any mine in the state, and make it *unlawful* for the operator of any coal mine to employ or suffer to serve as mine manager, mine examiner or hoisting engineer any person who does not hold such certificate of competency issued by the State Mining Board.

Sections 12, 16, 17, 18 and 19 impose distinct and separate duties upon inspectors, mine managers, hoisting engineers and mine examiners, defining with great particularity the precautions which each shall take in the interest of health and safety in the mines.

State inspectors of mines shall devote their whole time and attention to the duties of their office, make personal examination of every mine within their respective districts, see that every necessary precaution is taken to insure the health and safety of the miners; that the requirements of the Mining Law of Illinois are faithfully observed and obeyed and the penalties for violation of the same promptly enforced. He shall post notices in the mines as directed by Section 12 (f); shall act as sealer of weights (g) and test the accuracy of track and all smaller scales at mines (h); shall make report at the close of the year to the Bureau of Labor Statistics of his acts as such inspector during the year with recommendations as to legislation, and shall collect and tabulate statistics of mines and miners to accompany said report. (i.)

The mine manager shall instruct employes as to their respective duties; shall visit and examine the

working places in the mine as often as practicable; shall provide a sufficient supply of props, caps and timbers, etc., for the miners; shall see that cross cuts are made at proper distances apart to secure the best ventilation at the face of all working places, and that all stoppings along airways are properly and promptly built; shall keep careful watch over all ventilating apparatus and the air currents in the mine, and, in case of accident to fan or machinery by which the currents are obstructed or stopped, shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established; shall measure the air current and keep a record of such measurements for the inspector; shall examine roadways to escapement shafts, etc., and make a record thereof; shall give special attention to and instructions concerning storage and handling of explosives, etc.; shall see that dusty roads are sprinkled and that all dangerous places are properly marked; shall give attention to the hoisting ropes and test the same; shall have cages, safety catches, etc., frequently examined; shall have the mine examined every morning by the mining examiner before the men are allowed to go to work, and know that top and bottom men are on duty, and that sufficient lights are maintained at the landings. The mine manager or *his agent* shall be at his post at the mine when the men are lowered for work, and shall keep a record of such men, and he or *his agent* shall remain at night until all the men have been hoisted out. (Section 16 f.) Where the duties devolving upon the mine manager are too extensive to be discharged by one man, com-

petent persons may be appointed as assistants to the mine manager, who shall exercise *his functions under his instructions.* How could language more clearly indicate the complete independence of the mine manager from the control of the owner or operator of the mine with respect to the duties assigned to the manager by the statute?

A hoisting engineer shall be in constant attendance at his engine or boilers at all times where there are workmen underground. He shall not permit any one to enter or to loiter in the engine room except those authorized by their positions or duties to do so, *and he shall hold no conversation with any officer of the company or other person while the engine is in motion or while his attention is occupied with the signals.* A notice to this effect shall be posted on the door of the engine house. He shall perform the other duties in connection with his machinery minutely set forth in paragraphs (c), (d) and (e) of Section 17. Here again we note, even more conspicuously, the interference of the state between master and servant, and the statutory abolishment of that familiar common law relationship upon which the doctrine of *respondeat superior* has been reared.

A mine examiner shall be required at all mines. He shall visit the mine before the men are permitted to enter it, and first see that the air current is traveling in its proper course and in proper quantity, and then inspect all places where men are expected to pass or to work, and observe whether there are any recent falls or obstructions in rooms or roadways, or accumulations of gas or other unsafe condi-

tions. He shall especially examine the edges and accessible parts of recent falls and old gobs and air courses, and note his examination upon the wall; shall place a conspicuous mark wherever working places are discovered in which accumulations of gas or other dangerous conditions exist, and report his findings to the mine manager. He shall not allow any one to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein except under the direction of the mine manager until all of the conditions shall have been made safe. He shall make a record of the conditions of the mine, which shall be preserved in the office of the company, etc.

By way of more explicit definition of the duties already imposed upon the mine manager and mine examiner Section 19 points out that the air currents referred to shall be sufficient for the "health and safety of all men and animals employed in the mine; that they shall be not less than 100 cubic feet per minute for each person, or less than 600 cubic feet per minute for each animal in the mine, which may be increased at the discretion of the inspector; and that said currents shall be forced into every working place throughout the mine, so that all parts shall be reasonably free from standing powder-smoke and deleterious air of every kind."

The foregoing duties constitute a complete code of procedure for the interior management of the mine, in which, neither by name nor inference, is the owner or operator of the mine included in connection with the duties imposed.

Having thus established a stringent code of duties for owners and operators, inspectors, mine managers, hoisting engineers, mine examiners and miners (see Sections 16a and 31 *re* miners), the act insures its enforcement by providing penalties, both by fine and imprisonment, and denouncing as a misdemeanor "any wilful neglect, refusal or failure to do the things required to be done by *any* section, clause or provision of this act, on the part of the *person or persons* herein required to do them, or any violation of any of the provisions or requirements hereof, etc." (Section 33.)

The concluding paragraph of Section 33 gives the right of action asserted in this case in the following language:

> "For any injury to person or property occasioned by any wilful violations of this act or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were before such loss of life dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of $5,000."

We submit that a law, such as that above summarized, which singles out one class of individuals in the community, *i. e.*, the owners of coal mines, and imposes upon them liability for another's misdeeds, such as it imposes upon no other persons,—

holding them accountable in damages for the violation, by persons whom they are compelled by law to employ, of statutory duties enjoined upon such person solely,—abridges the privileges and immunities to which they are entitled as citizens of the United States, deprives them of liberty and property without due process of law and denies to them that protection of the law which the state accords to others within its jurisdiction.

The exact question now under consideration came before the Supreme Court of Pennsylvania in *Durkin* v. *Kingston Coal Co.*, 171 Pa. St., 193. The decision is of especial value as coming from the highest court of the greatest coal producing state in the Union, where the relative rights of mine owners and mine workers and the safety of the latter are of paramount importance.

One Durkin recovered judgment against the Kingston Coal Company and its mine foreman on account of the death of his son, due to the neglect of the mine foreman to examine the locality where the accident occurred as required by the act of 1891, entitled, "An act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith." The Pennsylvania act was substantially the same as the Illinois act now under consideration, as appears from the court's synopsis of its material provisions at page 200. It differed from the Illinois act in specifically providing that which the Illinois Supreme Court has read into this act, viz., a right of action against the owner or operator

for any failure of the mine foreman to comply with its provisions. In reversing the judgment as against the company and affirming it as against the foreman, the court say:

> "The first article of the constitution of this state, known as the bill of rights, declares that all men are possessed of certain inherent and inalienable rights. One of these is the right to acquire, possess and protect property. The preservation of this right requires both that every man should be answerable for his own acts and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. A statute that should impose such a liability or that should take the property of one person and give it to another, or to the public, without making just compensation therefor, would violate the bill of rights, and would be for that reason unconstitutional and void. (*Harvey* v. *Thomas,* 10 Watts, 66; Ervine's Appeal, 16 Pa., 265; Kneass' Appeal, 31 Pa., 87; *Wolford* v. *Morgenthal,* 91 Pa., 30; *Godcharles & Co.* v. *Wigeman,* 113 Pa., 431.) It is in furtherance of the right to acquire, possess and protect property that Sec. 18 of the bill of rights prohibits the enactment of laws that shall interfere with or impair the obligation of contracts. The tendency toward class legislation for the protection of particular sorts of labor has been so strong, however, that several statutes have recently been passed that could not be sustained under the provisions of the bill of rights. Such was the case in *Godcharles* v. *Wigeman, supra.* Such was the case with some recent provisions relating to mechanics' liens, and such is alleged by the appellant to be the case with some of the provisions of the Act of 1891, P. L. 176, under which this action was brought."

The court then reviews the provisions of the act and continues:

"After having thus most effectually taken the management of his mining operations out of his hands and committed it to officers of its own creation, whose employment is made compulsory upon him, the statute, in Sec. 8 of Art. 17, imposes upon the mine owner a liability for the neglect or incompetency of the men whom he is compelled to employ, in these words: 'That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any * * * mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid, a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained.' This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner, 'You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employes. We will determine what you shall do. In order to make it certain that our directions are obeyed we will set a mine foreman over your mines with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employes. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines, you shall pay for. If, notwithstanding our certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence.' *Under the operation of this statute the mine foreman represents the commonwealth.* The state insists on his employment by the mine owner, and in the name of the police power turns over

> to him the determination of all questions relating to the comfort and security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him, but if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another."

The court then further considers the case from the standpoint of the fellow-servant doctrine, declares the certified mine foreman is responsible for the consequences of his own negligence, and concludes as follows:

> "The ground on which we place our judgment is not, therefore, that the act is local, but that the provisions of it which we have considered are in violation of the bill of rights."

In *Williams* v. *Thacker Coal & Coke Co.*, 40 L. R. A., 812, which arose under a mining statute based upon that of Pennsylvania, the Supreme Court of Appeals of West Virginia say:

> "The statute requires that the operator or agent of every coal mine shall employ a competent and practical inside overseer. For what purpose? To better secure the proper ventilation of the coal mine, and promote the health and safety of persons employed therein. Operators and agents are not supposed to have the practical knowledge necessary to look after these matters which are of so much importance to the interests of the miners and employes in

and about the mines; therefore the Legislature with proper solicitude for the welfare of those who brave the dangers of the mines in order to make a living for those dependent upon them asserts its prerogative, and so far interferes with the private business of the capitalist who engages in the mining business as to require him to take into his employment a person whose experience in the business and sound judgment equip him for such management and oversight of the conduct of the mine as to reduce the dangers thereof to a minimum."

The court then refers with approval to the holding of the Pennsylvania court in the Durkin case, (*supra,*) that the Pennsylvania Act, in so far as it imposed liability on the mine owner for the failure of the mine foreman to comply with the provisions of the act which compelled his employment and defined his duties, was unconstitutional and void, and concludes:

"The duty of the operator or agent is to employ a competent mine boss according to the provisions of the statute, and when he has done so, he has discharged his duties to his employes in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from the negligence of the mine boss, *who is not a vice principal as his duties are not delegated to him by his employer, but are prescribed by statute.*"

In *Redstone Coke Co.* v. *Roby,* 115 Pa. St., at 368, the court say:

"It has been held in a number of recent cases that the mine owners are not responsible for the negligence of their mining boss. Reasonable care must be exercised in selecting a competent person for such position. But when

such care has been exercised the cases are clear that the company employing him is not liable for his negligence. This results necessarily from the Act of April 28, 1877, P. L., 58, which imposes upon the company the duty of providing a miners' boss. This act was passed, as its title shows, to protect the health and safety of the persons employed in the bituminous coal mines, and is a wise and just measure. The one great danger of such mining operations has always been the accumulation of foul air and gases, and it was to avoid this and secure proper ventilation that the fifth section of the act requires the mine owner, *nolens volens*, 'to employ a competent and practical inside overseer, to be called a mine boss,' etc. The section then proceeds to define his duties, the principal of which is to see that the mine is kept properly ventilated. The mining boss is therefore *a creature of the Legislature, selected by the mine owner, in obedience to the command of the law, and in the interest and for the protection of the miners themselves.* It has therefore been properly held that where the mine owners have exercised reasonable care for the selection of a competent mining boss, they are not liable for injuries resulting from his negligence."

In *Colorado Coal & Iron Co.* v. *Lamb*, 6 Colo. Appeals, at 205, it is said:

"We are unable to see how it is possible to compel a company to employ a mine boss, upon whom is laid the responsibility and the duty by statute to attend to the mine and its safety as a place to work in, clothe him with full authority and power in this respect, and subject him to punishments and responsibilities in case of failure, and then hold the master responsible for his acts. He is in no sense the representative of the master, from whom the statute attempts to take entire control of this part of his min-

ing operations. The master may supervise him and he may, so far as may be, direct such changes to be made as his judgment indicates to be necessary, but when the statute put the control of this particular matter into the hands of the boss and left to his judgment both the question of safety and the means to be used to that end, we are unable to see how he is in any sense, either as vice principal or otherwise, the representative of the master, or how he can stand in any other relation to his co-laborers than that of a fellow-servant."

The same result as to the unconstitutionality of this Illinois Act is reached by a consideration of the authorities holding that an employer is not liable at common law for the defaults of servants whose employment by him is compulsory. This doctrine is somewhat developed in the cases already cited and is squarely dealt with by other authorities, which we shall now consider.

"Where a person or a corporation is compelled by law to employ an individual in a given manner, no liability attaches for his tortious or negligent acts."

14 Am. & Eng. Enc. of Law (1st Ed.), 809.

"To constitute the relation of master and servant, and to fix the liability of the former for the negligence of the latter, resulting in injuries to third persons, there must exist a right to select the person claimed to be a servant, and also the power and duty to control his acts in regard to the transaction out of which the injury arose."

20 Am. & Eng. Enc. of Law (2nd Ed.), p. 180.

"When the law compels a corporation to give out a contract for grading a street to the lowest

bidder, it takes away from the corporation the responsibility arising from the acts of the person taking the contract."

James v. *San Francisco,* 6 Cal., 528.

"But it seems that a statute which undertakes to render an employer liable for the negligence of a compulsory employe, is unconstitutional and void."

Reno Employers' Liability Acts, 33.

In *Frazier* v. *Railroad Co.* 180 Mass., 427, the court held that the defendant was not liable for injury to a passenger occurring in a station which the railroad company was compelled by law to use.

This subject has been repeatedly before this court in the Pilotage cases, so-called, and while for many years there was considerable uncertainty in the Federal Courts upon this question owing to the confusion of the rules of maritime and the common law, it was finally set at rest in *Homer Ransdell Co.* v. *LaCompagnie, etc.,* 182 U. S., 406.

The New York Pilotage statute of 1857 provided that every master of a foreign vessel bound to or from the port of New York by the way of Sandy Hook "shall take a licensed pilot, or, in case of refusal to take such pilot, shall himself, owners or consignee, pay the said pilotage as if one had been employed, and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel." It further provided that any person not holding a license as pilot under this act who should pilot any vessel to or from the port of New York by the way of Sandy Hook should be punished

by fine or imprisonment, and that all persons employing a person to act as pilot and not holding a license under said act or under the laws of New Jersey should pay a fine.

This Court held that this statute clearly imposed compulsory pilotage; that the action in the case was at common law. and that at common law no action can be maintained against the owner of a vessel for the fault of a compulsory pilot, and this upon the ground that the pilot could not be considered under the circumstances as the representative or agent of the owner. The court quotes with approval the opinion of Lord ELLENBOROUGH, in *Carruthers* v. *Sydebotham,* 4 M. & S., 85, as follows:

> "Now, to make the pilot the representative of the master, and consequently to exempt the underwriters from liability for his acts, it must first be shown that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other; but does the master appoint the pilot? Certainly not; the regulations of the general pilot act impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed within any limits for which pilots are lawfully appointed. * * * But if the master cannot navigate without a pilot except under a penalty, is he not, under the compulsion of law, to take a pilot, and if so, is it just that he should be answerable for the misconduct of a person whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is that there is no privity between them."

To the same effect see *Crisp* v. *U. S., etc., Co.*, 124 Fed. R., 748, and *Harrison* v. *Hughes*, 125 Fed. R., 860.

The objection that the Illinois Act in question does not in express terms, such as those employed in the statute of other states heretofore considered, obligate the owner to employ these mine officials and that, therefore, there is a distinction between the cases cited and the one at bar, is completely met by the reasoning of Judge Jenkins in his dissenting opinion filed in *Fulton* v. *Wilmington Star Mining Company*, 133 Fed. Rep., 198, on appeal from a judgment in favor of the defendant, rendered upon an earlier trial of this case, when he says:

> "The cases of *Carruthers* v. *Sydebotham*, 4 M. & S., 77, 85, *Homer Ramsdell Transportation Company* v. *LaCompagnie Generale Trans-Atlantique*, 182 U. S., 406, *Crisp* v. *United States & Australasia S. S. Company*, 124 Fed., 748, *Durkin* v. *Kingston Coal Company*, 171 Pa. State, 193, and *Williams, Admx.*, v. *Thacker Coal and Coke Company, West Virginia*, 40 L. R. A., 812, are distinguishable from the case in hand in this one respect, that by the terms of the statute laws there considered it was obligatory upon the master to employ the servant for whose act he was sought to be held liable, while here, the obligation to employ a mine manager or boss is not rendered obligatory by the express terms of the statute. Is not, however, the distinction more imaginary than real? By the act in question the Legislature was dealing practically with a practical subject, the operation of mines, known of all men necessarily to require the aid of men and in divers service. Is it just to assert that the owner may himself serve as mine manager? The same argument would hold with respect to hoisting engineer

and others engaged in service about the mine. The owner could not act in either capacity unless licensed by the state, subject to revocation at the discretion of the State Mining Board. The mine owner, whether individual or corporation, desiring to use the property, could not possibly do it without employment of servants in the different departments specified in this act. Practically, therefore, the act is an inhibition upon the owner to operate the property unless he employ men of the class selected for him and licensed by the state. If the master is to be held for the act of his servant, he should have free choice in the selection of that servant. Liability for omission of duty by the servant cannot rightfully be an incident of employment under compulsion. The principle of law that justly holds one liable for the act of his agent within the scope of his employment, implies voluntary action upon the part of the master in engaging his agent, and unrestrained choice in his selection. Such unrestrained choice seems wanting here."

The foregoing reasoning is likewise a complete refutation of the position taken by the court in *Henrietta Coal Company* v. *Martin*, 221 Ill., at 466, in refusing to follow the lead of the Pennsylvania Supreme Court in declaring the mining law of that state unconstitutional in the Durkin case. They say:

"We think the effect of the statute is to require of the owner of the mine the performance of those duties which the statute prescribes for the mine examiner and the mine manager. The proprietor, if an individual, may himself act in either capacity if he possesses the necessary certificate, otherwise he is required to perform such duties through the manager or through the examiner. They stand for him and are vice-principals, and perform those duties, which he may not delegate to others in such manner as to

> relieve himself of responsibility. For any willful violation of the statute by either of them or for any willful failure of either of them to observe its provision, he is liable."

We submit that the argument thus advanced by the court is entirely fallacious, both because the statute, in terms not open to construction, imposes the duties upon the mine examiner and the other mine officials exclusively, and not upon the owner, who, therefore, has no duties of this character which can be delegated by him, and for the further reason that it is obviously impossible for the proprietor to act in the various capacities and perform the various duties required by the act. The latter point is the one relating to compulsory employment in which we are now especially interested. As Judge Jenkins says, "Is it just to assert that the owner may himself serve as mine manager? The same argument would hold with respect to hoisting engineers and others engaged about the mine." Reference to the synopsis of the qualifications and duties required by the Illinois Act of mine inspectors, examiners, managers and hoisting engineers presented at an earlier stage of this argument, shows the impossibility of any owners performing these multiplied and diversified duties, even if he could qualify for all of the positions. How could an individual proprietor, for example, acting as his own hoisting engineer, mine manager and mine examiner, comply with section 17 (a), requiring the hoisting engineer at any mine to be in constant attendance at his engines or boilers at the top of the mine at all times when there are workmen underground, and also with sections

16 and 18 requiring his attendance underground in the performance of the numerous duties therein specified while the workmen are in the mine? As a practical vocation coal mining would cease in the State of Illinois if all of the duties imposed by the act upon the officials mentioned had to be performed by a single proprietor. That mining officials, such as managers, examiners and hoisting engineers, are indispensable to the operation of a coal mine has been recognized in Illinois by years of legislation upon the subject, wherein these officials are referred to by their titles, and their presence in coal mines assumed. So far as mine examiners are concerned, the statute expressly provides *"a mine examiner shall be required at all mines"* (Section 18a.) When, therefore, the statute in addition provides in express terms that it shall be *unlawful* for the operator of any coal mine to employ or suffer to serve as a mine manager, a hoisting engineer or a mine examiner, one who does not hold a certificate of competency issued by the state's duly authorized Board of Examiners (Section 8 (e), (f) and (g)), it, in effect, and as fully for all legal and practical purposes as the Pilotage Law and other acts referred to, requires him either to employ such certificated officials or to cease doing business within the state.

If, then, the common law exempts all other employers of labor in Illinois from liability for the defaults of compulsory servants, while this act fastens such liability upon the owners of coal mines, how can it be maintained that the latter are accorded the equal protection of the laws? And when, by reason of such act, the owner's property is taken

under judgment of a court to pay for an injury which such compulsory servant has inflicted in violation of a duty specifically imposed upon him, the servant, why is not the owner deprived of property and liberty without due process of law?

"The words, 'due process of law'," says the Illinois Supreme Court in *Millett* v. *The People,* 117 Ill., 301, "are held to be synonymous with the words 'the law of the land'," citing Cooley on Constitutional Limitations (1st Ed.), pages 352-3. "And this means general public law, binding upon all the members of the community under all circumstances, and not partial or private laws affecting the rights of private individuals or classes of individuals," citing with other cases, *Van Zandt* v. *Waddell* 2 Yerger, 269.

The Illinois Court in the same case quotes with approval the following statement from the opinion in *Wally's Heirs* v. *Kennedy,* 2 Yerger, 554:

> "The rights of every individual must stand or fall by the same rule of *law* that governs every other member of the body politic or land under similar circumstances and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, the mass of the community, and those made the law, by another, whereas a like general law affecting the whole community equally could not have been passed."
>
> "Everyone," says Cooley's Constitutional Limitations, (1st Ed.), p. 391, "has a right to demand that he be governed by general rules,

and a special statute that singles his case out is one to be regulated by a different law from that which is applied to all similar cases *would not be legitimate legislation but an arbitrary mandate, unrecognized in free government.*"

And again, at p. 393:

"The man or class forbidden the acquisition or enjoyment of property in the same manner permitted to the community at large would be deprived of *liberty* in particulars of primary importance to his or their pursuit of happiness."

"On the other hand, it is also true that equal protection guaranteed by the Constitution forbids the Legislature to select a person, natural or artificial, and impose upon him, or it, burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual or one corporation and enact that whenever he or it is sued, the judgment shall be for double damages or subject to an attorney's fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule. Neither can it make a classification of individuals or corporations which is purely arbitrary and impose upon such class special burdens and liabilities. Even where the selection is not obviously unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

A., T. & St. Fe Ry. Co. v. *Matthews,* 174 U. S., 104-5.

The fact that the Illinois Mining Act may be regarded as a police measure does not prevent the application of the constitutional guaranty in question.

"The question of constitutional law to which we have referred," says the court in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 558, "cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore were reserved to the state when the Constitution was ordained. But as the Constitution of the United States is the supreme law of the land, anything in the Constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived. 'The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law.' The state has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to person within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Furthermore, the constitutional provision for the security of person and property should be liberally construed. See the opinion of Mr. Justice Bradley in *Boyd* v. *U. S.*, 116 U. S., 616, 635, quoted with approval in *Gulf Colorado & St. Fe Ry. Co.* v. *Ellis*, 165 U. S., at p. 154.

What is the essential difference between the business of coal mining as carried on in this state and

that of railroads, rolling mills, saw mills, and other equally hazardous pursuits which justifies the imposition of a civil liability in the one case which is unknown in the others? It may be that the police power will justify the regulation of the interior management of a coal mine by the state in the manner set forth in this act, by reason of the great dangers incident to such employment, but it is not regulation of the physical operation of the mine, in which, alone, the state is interested, to decree that in case the rules laid down for such operation are violated by the persons specially chosen to perform them, a third party, the owner, who is assigned no part in such operation, and can not regulate them if he would, shall be responsible in damages therefor.

This legislation cannot be justified upon the ground that the discrimination against owners of coal mines involved in the provision that they shall be liable for the willful defaults of these compulsory servants promotes the object for which the statute was passed as announced in its title, viz., providing for the health and safety of persons employed in coal mines. If the relations of owner and mine manager or examiner were left as at common law, then under the familiar rules governing master and servant, the operator would have a direct control over the acts of the manager and examiner and enjoy the privilege and be under the obligation of prescribing their duties and superintending the same, and would have such direct and immediate interest therein that a fine or penalty or right of action against him for injury caused by these servants would spur him to greater diligence and care in their

selection and supervision and in the framing of their rules of conduct, and to that extent it could be claimed that the imposition of such penalty or right of action would be promotive of the health and safety of the miners in his employ. But under this mining act, which invades and overturns the familiar common law relations of master and servant, the owner is powerless to protect his miners as to those matters which are committed by the state to the mine manager, hoisting engineer and mine examiner, and no amount of penalties or liability for injuries directed against him can improve his position or the miners' in that respect. He would be guilty of an illegal act if he attempted, for example, in the interest of his employes, to regulate the air currents in his own mine, or direct the manner in which explosives should be handled therein, without first passing an examination and procuring a state certificate as a mine manager or examiner, and the statute imposes no such obligation upon him.

Furthermore, the reasonable view to take of this legislation is that its object will be best promoted by imposing a civil liability upon those officials who are made directly responsible for the safety of the workers in the mine, for it accords with reason to hold that a mine manager would be more diligent in complying with the requirements of the act and thus more surely preserve the lives and health of the miners, if he knew that in case of his default he would be held liable in damages therefor, than he would while knowing that his employer would be the one to suffer in such a case. Every argument which justifies his criminal liability for violation of

the Act—and it will not be contended that the penalties prescribed by Section 33 could be inflicted upon the owner as punishment for the mine manager's default—calls for his civil liability for the same offense.

Finally it is to be said, that, all question of discrimination aside, such an act as this mining statute could not be upheld as against the Fourteenth Amendment, even if all employers of labor in the state were placed on the same basis of liability as there laid down, for the reason that it would deprive such employers of a privilege and immunity to which they are entitled as citizens of the United States. As said by Judge Cooley in the work above cited, such an act "would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government."

To again quote from the opinion in the Durkin case, *supra*, "This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame and for the fault of another." As stated at an earlier place in this same opinion, any law which arbitrarily rendered a person answerable for the acts and engagements of strangers, over whom he had no control, would violate one of the inherent and inalienable rights which all persons possess. The holding of the master for the act of his servant is justified in law solely upon the doctrine of *respondeat superior*, predicated upon the theory of delegated duties, and this theory has already, especially in cases of wilful acts on the part

of the servant, been strained to its utmost limitations in an effort to secure a responsible defendant. It is incapable of further extension under the Illinois Mining Act to include the mine owner, in the face of express negation of his position as *superior*, without resort to a new and revolutionary doctrine as yet unrecognized in American jurisprudence. If the Illinois legislature has the right contended for in the present action, of declaring those persons master and servant who are, upon every established principle of law, strangers, then it has the right to arbitrarily declare other strangers to be principal and agent, or husband and wife, or parent and child, irrespective of the facts in the case, and hold them liable before the law for the performance of the duties attendant upon those relationships.

As construed by the Illinois Supreme Court, we must read into Section 33 of the Act the following provision: "For any injury to person or property occasioned by any wilful violations of this Act, or wilful failure to comply with any of its provisions, a right of action *against the owner or operator of the mine* shall accrue to the party injured for any direct injuries sustained thereby." This is the only civil liability imposed and it extends to every provision of the Act which imposes a duty upon or prohibits an act by the mine officials or the miners, and these provisions make up the bulk of the Act. As it can not reasonably be presumed, in view of this section, that the legislature would have enacted this statute without any provision for civil liability, and as the only provision upon that subject in the Act has been shown to be unconstitutional, it follows

that the entire Act is invalid (see *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., at p. 565), and should be blotted out to make way for a sane and reasonable law upon this subject.

II.

THE COURT'S ERRONEOUS INSTRUCTION AS TO "PROXIMATE CAUSE."

The Court instructed the jury that if they believed from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway and that Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the plaintiff could not recover. (Rec., 97.) This instruction was proper both because such act of the mine manager would not be a violation of the statute, there being no prohibition of such act therein, and for the further reason that if such order from the mine manager was the proximate cause of Fulton's death, then none of the acts charged in the eight counts of the declaration would be such proximate cause, as it was requisite that some one or more of them should be to justify a recovery herein. (*Denman* case, 185 Ill., 418.) The court, however, then proceeded to define to the jury the meaning of "proximate cause" as used in the foregoing instruction, and in so doing used the following language (Rec., 97-8):

> "You will note there that it follows, if you believe that this instruction, if there was one, to Fulton, was the proximate cause of his death,

note that in passing upon that question you must determine whether, first, if there was gas there at that time and whether, if there was, that was or was not the proximate cause of his death.

Now, by 'proximate cause' is meant efficient cause. In other words, if the gas had not been there would his death have followed?

And was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there the thing which caused his death; which was the greater cause? That is a question of fact for you gentlemen to determine."

We submit that the necessary result of this instruction was to hopelessly confuse the jury as to the true issue then under consideration. It may be conceded that if the gas had not been there Fulton's death would not have followed, and that the presence of gas there was necessary to his death, and still the question whether Wilson's order was the proximate cause of death remains unanswered. The gas was merely the instrumentality through which Fulton's death was brought about, just as the water beneath the vessel is the instrumentality that produces the death of one who drops overboard. Each element is necessary to the death in the given case, yet neither is the proximate cause of the death, in the legal sense of that term, nor does the fact that it is so necessary throw any light on the question of proximate cause. If the man went overboard as the result of a deliberate attempt at suicide, then his own act was the proximate cause of his death. If he was ordered by the captain to jump overboard and did so because of such order, and against his

own wishes, then the captain's act was the proximate cause of death. In either case the water plays the same part in the tragedy. So with the gas in the mine. If Fulton entered the gaseous roadway because of Wilson's command, and would not otherwise have done so, then such act on Wilson's part was the proximate cause of his death. If he entered for some other reason than the command from Wilson, then such act of Wilson's was not the proximate cause of death. In either event the gas was essential to the fatal result, but not in law its efficient cause. Yet the court, in effect, told the jury that if the presence of gas in the roadway was necessary to Fulton's death, then such gas and not Wilson's order, was the proximate cause of death and the defendant would be liable therefor; and this statement was repeated by the court after defendant's counsel had taken an exception to the original instruction. (Rec., 101.) Furthermore, the court said to the jury, "Was gas being there necessary to his death? Or was the instruction, if there was one, their wilfully sending him there, the thing which caused his death; *which was the greater cause?*"—a comparison which had no proper place in a consideration of proximate cause and which still further tended to mislead the jury as to the true issue before them.

The testimony of the witness Schmitz (Rec., 56) that Wilson had ordered Fulton to enter the west roadway just before his death was the turning point of the case before the jury. Plaintiff had introduced this testimony to show a wilful, deliberate act on the part of the defendant conducing to Fulton's death. Defendant sought to show that such act, if it oc-

curred, furnished an independent and proximate cause of death not counted on in the declaration nor covered by the statute. The defendant was entitled to an accurate instruction upon this vital point, instead of the misleading definition which made defendant's liability turn upon the question whether the presence of gas in the mine was necessary to Fulton's death. We submit that this instruction constituted reversible error.

III.

FULTON'S DEATH WAS DUE TO HIS ENTRY INTO THE WEST ROADWAY OF THE MINE EITHER BY REASON OF WILSON'S ORDER SO TO DO OR ELSE UNDER CIRCUMSTANCES THAT AMOUNTED TO AN UNLAWFUL ACT ON HIS PART, CONTRARY TO THE PROVISIONS OF SECTION 31 OF THE MINING ACT. IN EITHER CASE PLAINTIFF WAS BARRED FROM A RECOVERY HEREIN.

In referring in this connection to the evidence introduced upon the trial we do so not with a view to asking this court to weigh the evidence upon any disputed fact, but for the purpose of showing that upon a set of facts established upon the trial which can not and will not be disputed the plaintiff is absolutely barred from recovery herein. The questions considered are solely questions of law, depending for their solution upon the meaning of certain provisions of the Mining Act.

There are three, and only three, possible explanations of Fulton's entry into the gaseous west roadway of the mine on the morning of his death, which

the evidence discloses. Either (1) Wilson, the mine manager, ordered him to enter and he did so in obedience thereto, or (2) Wilson cautioned him not to enter until the gas had cleared out and he entered in spite of such warning, or (3) no order or caution was given by Wilson, but Fulton entered of his own volition, well knowing that there was gas in the roadway which his open lamp would, in all likelihood, explode. Upon theory number 1, Wilson's act was the proximate cause of Fulton's death and the defendant was not liable as the court undertook, though in misleading terms, to tell the jury. (Rec., 97-8.) Under theory number 2 Fulton was guilty of the unlawful act of entering the roadway against caution (see Sec. 31 of Statute), thereby directly contributing to his own death and the court properly instructed the jury to that effect. (Rec., 98.) Under theory number 3 Fulton, if he knew that there was gas in the roadway which was liable to explode upon contact with his open light, was in the performance of a "wilful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof" was endangered, which is expressly made unlawful by the concluding provision of said Section 31, as the Court should have instructed the jury, upon request of defendant, but which the court refused to do (Rec., 107), an error on its part which we shall hereafter consider.

The evidence bearing upon these t' ree possible theories of Fulton's action is as follows:

(1) The witness Schmitz, who was with Fulton at the time of the accident, testified (Rec., 55-6) that while he and Fulton and Wilson were at the bottom

of the shaft Wilson told Fulton to go into the west roadway. This is all the evidence in support of such order. Schmitz further testified that Wilson gave no order to wait until the gas was out of the roadway.

(2) Wilson testified (Rec., 66, 73) that he gave no instructions to Fulton to go into the west roadway, but on the contrary, cautioned him against going into it until the fan had cleared out the gas and he, Wilson, had gone in and tested it with a safety lamp. This, and Capet's corroboratory testimony at page 88 of the Record, was all the evidence in support of such warning.

(3) It is of course possible that neither Schmitz nor Wilson told the truth and that neither order nor warning was given by the latter, in which event, and in the absence of all other explanation, it must be assumed that Fulton entered the roadway upon his own volition. He and Schmitz had with them the naked lights that caused the explosion (Rec., 33, 45). It only remains to show that Fulton knew that there was gas in the roadway and that an explosion was likely to follow, in order to establish his action as grossly reckless and unlawful under the statute.

Fulton was 36 years old at the time of his death and for more than seventeen years had been a track layer in the mines of the defendant (Rec., 49, 62). He had been working in the mine where he met his death for some time before the accident—Wilson says two or three months (Rec., 62)—and had laid all the track that had been laid in the mine, including that in the west roadway (Rec., 40, 62), and

had brushed gas out of it. (Rec., 83). There was always gas in the west roadway from the time it was opened until the time of the accident (Rec., 40, 64) and the fan which had been installed in this roadway some two months prior (*Ibid.*), was, as every workman in the mine of course knew, put in to overcome this difficulty. Fulton was with Wilson on the previous afternoon when the latter had stopped the fan in the mine, after the men quit work (Rec., 65), and on the morning in question he had helped to start the fan (Rec., 35, 65, 83) and therefore knew that the gas had been accumulating in the west roadway over night.

Furthermore, the testimony of Callegaro and Bromley (Rec., 76-7) shows that an explosion had previously occurred in this very roadway, and that Fulton knew about it; also that he had shown Bromley how the gas could be set off with a miner's lamp.

None of the foregoing testimony is disputed or contradicted by a syllable of evidence in the record. It establishes beyond the possibility of doubt Fulton's acquaintance with the gaseous condition of the west roadway and the risk he ran in entering it with an open lamp, and such being the case, his act was willful under the definition of that term adopted by the Illinois Supreme Court.

> "'Willful' is a word of familiar use in every branch of law and although in some branches of law it may have a special meaning it generally, as used in courts of law implies nothing blamable but merely that the person of whose act or default of expression is used as a free agent and that what has been done arises from

> the spontaneous action of law. It means but nothing more than this, that he knows what he is doing, and intends to do, what he is doing, and is a free agent. (29 Am. & Eng. Enc. of Law, 113.) An act *consciously* omitted is *wilfully* omitted, in the meaning of the word willful as used in these enactments of our Legislature relative to the duty of miners. In *Carterville Coal Co.* v. *Abbott,* 181 Ill., 495, we said (p. 502): 'Where an owner, operator or manager so constructs or equips his mine that he knowingly operates it without conforming to the provisions of this act he wilfully disregards its provisions and wilfully disregards the safety of miners employed therein.' '' (*Odin Coal Co.* v. *Denman,* 185 Ill., 413.)

See also *Southern Ry. Co.* v. *Carroll,* 138 Fed. Rep., 638, holding that where a traveler, knowing of the existence of a roailroad crossing, approached it at night in a carriage with drawn side curtains, without looking or listening for the approach of a train, which was within sight and hearing, he was guilty of *willful* negligence, such as barred him from recovery therein.

Fulton's willful act, therefore, in entering the west roadway with full knowledge of its condition and the risks involved, both to himself and to others and to the mine, constituted an unlawful act under the concluding provision of Section 31 of the Mining Statute, and absolutely barred him from a recovery herein, under the familiar doctrine that when a plaintiff's own unlawful act concurs in causing the damage that he complains of, he cannot recover therefor. See, for a full exposition of this doctrine, the authorities cited under IV of the Brief of Argument. The Illinois rule that contrib-

utory negligence is no defence to an action brought under this statute, has no application where the act of the plaintiff is one forbidden by the statute and expressly denounced as unlawful.

From whatever standpoint the evidence is viewed no cause of action against the defendant company was shown, and the court should have taken the case from the jury as requested at the close of all the evidence.

IV.

THE QUESTION OF FULTON'S UNLAWFUL ACT IN WILFULLY ENTERING THE WEST ROADWAY SHOULD HAVE BEEN SUBMITTED TO THE JURY UNDER PROPER INSTRUCTIONS.

The defendant requested the court to give to the jury the following instruction (Rec., 107):

> "You are instructed that under the laws of this state in force at the time of Samuel Fulton's death, it was unlawful for any miner or other workman in a mine to do any wilful act whereby the lives or health of persons working in mines or the security of a mine or the machinery thereof was endangered, and such unlawful act was punishable by a fine not exceeding five hundred dollars ($500), or by imprisonment in the county jail for a period not exceeding six months, or both, at the discretion of the court. You are further instructed that if you believe from the evidence that Samuel Fulton at the time he was killed was engaged in a wilful act which endangered the lives or health of persons working in the mine with him, or the security of the mine or its machinery, and that such wilful act on his part contributed to his death, then the plaintiff cannot recover in this action."

The foregoing instruction is based upon Sections 31 and 33 of the statute, and the first half is substantially a quotation from the language employed in the Act. The Act says in express terms that any wilful act, such as that described in the instruction, shall be unlawful, and we are at a loss to understand why the court refused to submit to the jury the question whether or not Fulton's conduct preceding his death constituted such wilful act. There was certainly sufficient evidence to go to the jury of experience and explicit knowledge on his part as to the conditions prevailing in the west roadway, and also a categorical denial by Wilson of Schmitz' charge that he had ordered Fulton into this roadway. The court's refusal is the more surprising in view of its submission to the jury of the question whether Fulton was cautioned by Wilson not to enter the west roadway until the fan had cleared the gas therefrom and Wilson had run up with a safety lamp and tested the air, and its instruction that if such caution was given and was disregarded by Fulton and his death resulted therefrom, then the plaintiff could not recover. (Rec., 97.) Certainly, if the latter instruction was proper under Section 31 of the Act, the refused instruction now in question was equally appropriate. In fact, both instructions were proper and should have been given to the jury, for it cannot be questioned that under the familiar doctrine already alluded to, if the unlawful act denounced by the statute was done by Fulton and contributed to his death, the plaintiff could not recover in this action.

Another instruction along this same line which

was asked and improperly refused by the court (Rec., 107) was that referred to in the 37th assignment of error, to the effect that no recovery could be had if Fulton's death resulted in part from his own reckless disregard of consequences in view of his surroundings and knowledge of the conditions in the mine as disclosed by the evidence. While the Act does not in terms declare a reckless disregard of consequences unlawful, and it could not, therefore, perhaps, be relied upon as a defense under Section 31, still such conduct would be clearly *willful,* and sufficient to bar a claim against the defendant for *willful* violation of the statute. While the Illinois courts have held mere contributory negligence no defense to an action under this Act, they have never declared that willful conduct on plaintiff's part would not bar recovery thereunder, and it would seem, upon principle, that if, as is the law even in Illinois, ordinary contributory negligence, is a defense to ordinary negligence, then plaintiff's willful conduct should constitute a defense to defendant's willful conduct, where it contributes to the injury. Whether viewed as generally reckless and willful, or as willful within the definition of Section 31, Fulton's conduct should bar the plaintiff's recovery, but the jury were given no opportunity to pass upon either question.

V.

THE JURY SHOULD HAVE BEEN INSTRUCTED THAT NO RECOVERY COULD BE HAD UNDER THE SECOND, THIRD, FIFTH AND SIXTH COUNTS OF THE DECLARATION BECAUSE OF THE ABSENCE OF ANY EVIDENCE TO SUSTAIN THEM UNDER A PROPER CONSTRUCTION OF THE STATUTE.

Second and Third Counts. (Rec., 5-6.)

These counts charge the defendant with wilfully failing to provide "cross-cuts" and "stoppings" in the mine. It conclusively appears from the evidence, however, without any attempt at contradiction, that the defendant's mine in question was a "long-wall" mine, so-called, in which kind of mines "cross-cuts" and "stoppings" are unknown, it being only "room and pillar" mines, which are constructed with parallel entries, in which "cross-cuts" and "stoppings" are used. (Rec., 32, 41-3.) The statute, therefore, had no application in this respect to the defendant's mine, and the court, for the purpose of simplifying the intricate issues before the jury, and removing from their consideration questions of fact which were not legally before them under a proper construction of the Mining Act, should have eliminated these two counts, and also the fifth and sixth, hereinafter next dnscussed, by granting defendant's motion to strike out these counts, made at the close of plaintiff's case (Rec., 61), or defendant's request for instructions to that effect. (Rec., 102.)

Fifth Count. (*Rec.,* 20.)

This count charges that the defendant permitted Fulton to enter the mine to work therein before the dangerous gas had been removed and the mine made safe, said Fulton not being then and there under the direction of said defendant's mine manager. This charge is based upon Section 18 (b) of the Act, providing that no one shall be allowed to enter the mine to work therein *except under the direction of the mine manager* until all conditions shall have been made safe.

Undisputed evidence shows that Fulton was in the mine on this Sunday morning under direction of the mine manager, Wilson. That Wilson was present in the mine before and at the time of the accident is conceded. Furthermore, he testifies (Rec., 64, 65) that on the preceding afternoon he had a conversation with Fulton in the mine, in which Fulton asked if it would not be well for him to get some of his work ahead, he then being behind in his track laying, and Wilson told him "Yes, it would be all right." Fulton accordingly came to the mine on the following morning, where Wilson saw him at the top of the shaft and assisted him in carrying props, switch points, etc., down the shaft. At the bottom of the shaft, just before the accident, Wilson had a further conversation with Fulton, which he details as follows:

"The conversation I had with Fulton was in regard to the directions of this roadway" (*i. e.*, the west roadway where Fulton was killed). "They got off the bearing a little too much to the right. I directed them to keep close to the right-hand side and keep it to the proper course. The track was laid

past (indicating) the point marked D (indicating). Our conversation was in regard to the course of that road. I was telling him to put the track so as to get it back to its regular course and after we had talked the matter over he wanted to know if there was not going to be some one to help him. I said, 'Yes, I will give you Schmitz,'" etc.

This testimony is no where contradicted. On the contrary, Schmitz' testimony, upon which plaintiff strongly relied, was to the effect that Fulton was ordered into the west roadway by Wilson just prior to his death. That Fulton was in the mine that morning under the mine manager's direction must, therefore, be conceded, and such being the case the charge to the contrary in the fifth count was fully negatived, and the question of liability involved therein should not, therefore, have been submitted to the jury. (Rec., 61, 103.)

There is another error alleged in connection with this fifth count which may be conveniently discussed at this point.

The provisions of Section 18 (b) of the Act that "no one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating currents, nor to enter the mine to work therein except under the direction of the mine manager, until all conditions shall have been made safe," clearly implies that one acting under the direction of the mine manager shall be allowed to remain in a part of the mine through which gas is being carried into the ventilating current, or to enter the mine to work therein before all conditions shall have been made safe. Unless thus interpreted the

proviso, "except under the direction of the mine manager," is meaningless. We contend that, it appearing in this case that Fulton, in entering the mine to work in the west roadway where gas was being carried at the time by the fan into the ventilating current, was acting under the immediate direction and in the presence of the mine manager, Wilson, no liability exists as against the defendant for his death occurring under such circumstances and by reason thereof. In any event, the defendant was entitled to have the jury instructed that if they found that Fulton, in so entering the mine, was acting under the direction of the mine manager, they should find the defendant not guilty. This request was made of the court (Rec., 107) and refused, and we insist that error was committed thereby.

Sixth Count. (*Rec.*, 22.)

Plaintiff's sixth count is based upon Section 16(b) of the Act requiring the mine manager to keep a careful watch over all ventilating apparatus and the air currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed or stopped, to at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established.

It would seem to be too clear to require argument that the contingency referred to in the foregoing provision is some sudden and unexpected casualty or event occurring while the mine and its ventilating machinery is in operation which obstructs, or altogether stops the air currents which are serving the miners at their work, thereby endangering their

lives and safety. The reference to the *re-establishment* of the ventilation by its very terms implies the existence of ventilation before the accident in question.

In support of this count evidence was introduced that when the men entered the mine that Sunday morning the monkey wrench which was customarily used upon the stem of the pump valve in place of the wheel, which was originally attached thereto, to turn it and let steam into the pipe which led to the fan, was missing, and that a delay of a few moments was thereby caused while Wilson went to the top of the shaft and procured another monkey wrench for the purpose stated. (Rec., 54,65.)

This is the sum and substance of plaintiff's evidence in support of the charge of an accident to the fan and machinery, and it is uncontradicted. There is no evidence whatever that any currents in the mine were obstructed or stopped, and there could not be, for it is conceded that there were at the time no currents of air in the mine, as the fan was not then in operation and had not been since the middle of the preceding afternoon. The incident was wholly devoid of any danger to the men in the mine, as they merely waited at the foot of the shaft until the fan had been started and the ventilation begun. The loss of the monkey wrench was, at the most, an accident which delayed the starting of the fan or machinery in the mine and of the air currents resulting therefrom, as to which no prohibition or duty is imposed by the Act. Under the strict construction which must be placed upon this mining statute, with its numerous requirements in derogation of the com-

mon law, it cannot be held that the incident referred to was a violation of the Act for which the defendant should be held liable.

Upon this question of strict construction, we call attention to the following authorities:

In *Cole* v. *Mayne*, 122 Fed. R., at 843, the court says, in reference to the Missouri Mining Act then under consideration, quoting from *Hamilton* v. *Jones*, 125 Ind., 178:

> "Statutes in derogation of the common law are to be construed strictly, and one who seeks to maintain an action which was within the prohibition of the common law must be able to point to a statute which in plain and explicit terms authorizes the action to be maintained. A plaintiff who sues on a right of action given by statute must present a case clearly within the statute which creates the right."
>
> "No statute is to be construed as altering the common law as making any innovation upon the common law which it does not fairly express."
>
> *Shaw* v. *Railroad Co.*, 101 U. S., at 565.

"Again, this act of Congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employes suffered in the discharge of this duty. Since its passage the employes no longer assume this risk and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its lan-

guage necessarily requires. *Shaw* v. *Railroad Co.*, 101 U. S., 557, 565; 25 L. Ed., 892; *Fitzgerald* v. *Quann*, 109 N. Y., 441, 445; 17 N. E., 354; *Brown* v. *Barry*, 3 Dall., 365, 367; 1 L. Ed., 638.

Johnson v. *Southern Pacific Co.*, 117 Fed. Rep., at 466.

We contended before the trial court that the proper construction of the provision of the Mining Act referred to required an instruction to the jury that no recovery could be had under this sixth count and that it should be stricken from the pleadings submitted to the jury. The court, however, refused to give such instruction or motion (Rec., 61, 103) and further error is assigned thereon.

Upon the foregoing considerations we submit that the Illinois Mining Act of 1899, as interpreted by the Illinois Supreme Court, is wholly unconstitutional and void and gave no right of action in this case. Should the court, however, sustain the Act, then we insist that material errors were committed upon the trial of the case in the Circuit Court in repect to the matters argued herein which call for its reversal.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
Attorneys for Plaintiff in Error.

APPENDIX.

AN ACT *to revise the laws in relation to coal mines and subjects relating thereto, and providing for the health and safety of persons employed therein. In force July 1, 1899.*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

MAPS OR PLANS OF MINES.

MAPS NECESSARY. (*a*) That the operator of every coal mine in this State shall make, or cause to be made, an accurate map or plan of such mine, drawn to a scale not smaller than 200 feet to the inch, and as much larger as practicable, on which shall appear the name, the state, county and township in which the mine is located, the designation of the mine, the name of the company or owner, the certificate of the mining engineer or surveyor as to the accuracy and date of the survey, the north point and the scale to which the drawing is made.

SURFACE SURVEY. (*b*) Every such map or plan shall correctly show the surface boundary lines of the coal rights pertaining to each mine, and all sections or quarter section lines or corners within the same; the lines of town lots and streets, the tracks and sidetracks of all railroads, and the location of all wagon roads, rivers, streams, ponds, buildings, landmarks and principal objects on the surface.

UNDERGROUND SURVEY. (*c*) For the underground workings said maps shall show all shafts, slopes, tunnels or other openings to the surface or to the workings of a contiguous mine; all excavations, entries, rooms and cross-cuts; the location of the fan or furnace and the direction of the air currents; the location of pumps, hauling engines, engine planes, abandoned works, fire walls and standing water; and the boundary line of any surface outcrop of the seam.

MAP FOR EVERY SEAM. (*d*) A separate and similar map, drawn to the same scale in all cases, shall be made of each and every seam, which, after the passage of this act, shall be worked in any mine, and the maps of all such seams shall show all shafts, inclined planes, or other passageways connecting the same.

SEPARATE MAP FOR THE SURFACE. (*e*) A separate map shall also be made of the surface whenever the surface buildings, lines or objects are so numerous as to obscure the details of the mine workings if drawn upon the same sheet with them, and in such case the surface map shall be drawn on transparent cloth or paper, so that it can be laid upon the map of the underground workings, and thus truly indicate the local relation of lines and objects on the surface to the excavations of the mine.

THE DIP. (*f*) Each map shall also show by profile drawing and measurements, in feet and decimals thereof, the rise and dip of the seam from the bottom of the shaft in either direction to the face of the workings.

COPIES FOR INSPECTORS AND RECORDERS. (*g*) The originals or true copies of all such maps shall be kept in the office at the mine, and true copies thereof shall also be furnished to the State Inspector of Mines for the district in which said mine is located, and shall be filed in the office of the recorder of the county in which the mine is located, within thirty days after the completion of the same. The maps so delivered to the inspector shall be the property of the State and shall remain in the custody of said inspector during his term of office, and be delivered by him to his successor in office; they shall be kept at the office of the inspector and be open to the examination of all persons interested in the same, but such examination shall only be made in the presence of the inspector, and he shall not permit any copies of the same to be made without the written consent of the operator or the owner of the property.

ANNUAL SURVEYS (*h*) An extension of the last preceding survey of every mine in active operation shall be made once in every twelve months prior to July 1, of every year, and the result of said survey, with the date thereof, shall be promptly and accurately entered upon the original maps and all copies of the same, so as to show all changes in plan or new work in the mine, and all extensions of the old workings to the most advanced face or boundary of said workings, which have been made since the last preceding survey. The said changes and extensions shall be entered upon the copies of the maps in the hands of the said inspector and recorder, within 30 days after the last survey is made.

ABANDONED MINES. (*i*) When any coal mine is

worked out or is about to be abandoned or indefinitely closed, the operator of the same shall make or cause to be made a final survey of all parts of such mine, and the results of the same shall be duly extended on all maps of the mine and copies thereof, so as to show all excavations and the most advanced workings of the mine, and their exact relation to the boundary or section lines on the surface.

Special survey. (*j*) The State Inspector of mines may order a survey to be made of the workings of any mine, and the results to be extended on the maps of the same and the copies thereof, whenever, in his judgment, the safety of the workmen, the support of the surface, the conservation of the property or the safety of an adjoining mine requires it.

Penalty for failure. (*k*) Whenever the operator of any mine shall neglect or refuse, or, for any cause not satisfactory to the mine inspector, fail, for the period of three months, to furnish to the said inspector and recorder the map or plan of such mine or a copy thereof, or of the extensions thereto, as provided for in this act, the inspector is hereby authorized to make or cause to be made, an accurate map or plan of such mine at the expense of the owner thereof, and the cost of the same may be recovered by law from the said operator in the same manner as other debts by suit in the name of the inspector and for his use, and a copy of the same shall be filed by him with said recorder.

THE MAIN SHAFT.

§ 2. SINKING SUBJECT TO INSPECTION. (*a*) Any shaft in process of sinking, and any opening projected for the purpose of mining coal, shall be subject to the inspection of the State Inspector of Mines for the district in which said shaft or opening is located.

PASSAGEWAY AROUND THE BOTTOM. (*b*) At the bottom of every shaft and at every caging place therein, a safe and commodious passageway must be cut around said landing place to serve as a traveling way by which men or animals may pass from one side of the shaft to the other without passing under or on the cage.

GATES AT THE TOP. (*c*) The upper and lower landings at the top of each shaft, and the opening of each intermediate seam from or to the shaft, shall be kept clear and free from loose materials, and shall be securely fenced with automatic or other gates, so as to prevent either men or materials from falling into the shaft.

GENERAL EQUIPMENT. (*d*) Every hoisting shaft must be equipped with substantial cages fitted to guiderails running from the top to the bottom. Said cages must be safely constructed; they must be furnished with suitable boiler-iron covers to protect persons riding thereon from falling objects; they must be equipped with safety catches. Every cage on which persons are carried must be fitted up with iron bars or rings in proper place and sufficient number to furnish a secure hand-hold for every person

permitted to ride thereon. At the top landing, cage supports, where necessary, must be carefully set and adjusted so as to act automatically and securely hold the cages when at rest.

THE ESCAPEMENT SHAFT.

§ 3. Two places of egress. (*a*) For every coal mine in this State whether worked by shaft, slope or drift, there shall be provided and maintained, in addition to the hoisting shaft, or other place of delivery, a separate escapement shaft or opening to the surface, or an underground communicating passageway between every such mine and some other contiguous mine, such as shall constitute two distinct and available means of egress to all persons employed in such coal mine.

The time allowed for completing such escapement shaft or making such connections with an adjacent mine, as is required by the terms of this act, shall be three months for shafts 200 feet or less in depth, and six months for shafts less than 500 feet and more than 200 feet in depth, and nine months for all other mines, slopes or drifts or connections with adjacent mines. The time to date in all cases from the hoisting of coal from the main shaft.

Unlawful to employ more than ten men.] (*b*) It shall be unlawful to employ at any one time more men than in the judgment of the inspector is absolutely necessary, for speedily completing the connections with the escapement shaft or adjacent mine; and said number must not exceed ten men at any one time for any purpose in said mine until such escapement or connection is completed.

PASSAGEWAYS TO ESCAPEMENT.] (*c*) Such escapement shaft or opening, or communication with a contiguous mine as aforesaid, shall be constructed in connection with every seam of coal worked in such mine, and all passageways communicating with the escapement shaft or place of exit, from the main hauling ways to said place of exit, shall be maintained free of obstruction at least five feet high and five feet wide. Such passageways must be so graded and drained that it will be impossible for water to accumulate in any depression or dip of the same, in quantities sufficient to obstruct the free and safe passage of men. At all points where the passageway to the escapement shaft, or other place of exit, is intersected by other roadways or entries, conspicuous sign boards shall be placed, indicating the direction it is necessary to take in order to reach such place of exit.

DISTANCE FROM MAIN SHAFT.] (*d*) Every escapement shaft shall be separated from the main shaft by such extent of natural strata as may be agreed upon by the inspector of the district and the owner of the property, but the distance between the main shaft and escapement shaft shall not be less than 300 feet without the consent of the inspector, nor more than 300 feet without the consent of the owner.

BUILDINGS ON THE SURFACE.] (*e*) It shall be unlawful to erect any inflammable structure or building in the space intervening between the main shaft and the escapement shaft on the surface, or any powder magazine, in such location or manner as to jeopardize the free and safe exit of the men from the mine, by said escapement shaft, in case of fire in the main shaft buildings.

STAIRWAYS OR CAGES.] (f) The escapement shaft at every mine shall be equipped with safe and ready means for the prompt removal of men from the mine in time of danger, and such means shall be a substantial stairway set at an angle not greater than 45 degrees, which shall be provided with hand rails and with platforms or landings at each turn of the stairway.

In any escapement shaft which may, at the time of the passage of this act, be equipped with a cage for hoisting men, such cage must be suspended between guides and be so constructed that falling objects cannot strike persons being hoisted upon it. Such cage must also be operated by a steam hoisting engine, which shall be kept available for use at all times, and the equipment of said hoisting apparatus shall include a depth indicator, a brake on the drum, a steel or iron cable and safety catches on the cage.

OBSTRUCTIONS IN SHAFT.] (g) No accumulation of ice, nor obstructions of any kind shall be permitted in any escapement shaft, nor shall any steam, or heated or vitiated air be discharged into said shaft; and all surface or other water which flows therein shall be conducted by rings or otherwise to receptacles for the same, so as to keep the stairway free from falling water.

WEEKLY INSPECTIONS.] (h) All escapement shafts and the passageways leading thereto, or to the works of a contiguous mine, must be carefully examined at least once a week by the mine manager, or a man specially delegated by him for that purpose, and the

date and findings of such inspection must be duly entered in the record book in the offices at the mine. If obstructions are found, their location and nature must be stated together with the date at which they are removed.

COMMUNICATION WITH ADJACENT MINE.] (i) When operators of adjacent mines have, by agreement, established underground communication between said mines, as an escapement outlet for the men employed in both, the roadways to the boundary on either side shall be regularly patrolled and kept clear of every obstruction to travel by the respective operators, and the intervening door shall remain unlocked and ready at all times for immediate use.

When such communication has once been established between contiguous mines, it shall be unlawful for the operator of either mine to close the same without the consent both of the contiguous operator and of the State Inspector for the district: *Provided,* that, when either operator desires to abandon mining operations, the expense and duty of maintaining such communication shall devolve upon the party continuing operations and using the same.

THE ENGINE AND BOILER HOUSE.

§ 4. LOCATION.] (a) Any building erected after the passage of this act, for the purpose of housing the hoisting engine or boilers at any shaft, shall be substantially fire-proof, and no boiler house shall be nearer than 60 feet to the main shaft or opening or to any building or inflammable structure connecting therewith.

BRAKE ON DRUM.] (b) Every hoisting engine shall be provided with a good and sufficient brake on the drum, so adjusted that it may be operated by the engineer without leaving his post at the levers.

FLANGES.] (c) Flanges shall be attached to the sides of the drum of any engine used for hoisting men, with a clearance of not less than four inches when the whole rope is wound on the drum.

CABLE FASTENINGS.] (d) The ends of the hoisting cables shall be well secured on the drum, and at least two and a half laps of the same shall remain on the drum when the cage is at rest at the lowest caging place in the shaft.

INDICATOR.] (e) An index dial or indicator, to show at all times the true position of the cages in the shaft, shall be attached to every hoisting engine for the constant information and guidance of the engineer.

SIGNALS.] (f) The code of signals as provided for in this act, shall be displayed in conspicuous letters at some point in front of the engineer when standing at his post.

GAUGES.] (g) Every boiler shall be provided with a steam gauge, except when two or more boilers are equipped and connected with a steam drum, properly connected with the boilers to indicate the steam pressure, and another steam gauge shall be attached to the steam pipe in the engine house, the two to be placed in such positions that both the engineer and fireman can readily see what pressure is being carried. Such steam gauges shall be kept in good order and adjusted and be tested as often at least as every six months.

SAFETY VALVES.] (h) Every boiler or battery of boilers shall be provided with a safety valve of sufficient area for the escape of steam, and with weights and springs properly adjusted.

INSPECTION OF BOILERS.] (i) All boilers used in generating steam in and about coal mines shall be kept in good order, and the operator of every coal mine where steam boilers are in use shall have said boilers thoroughly examined and inspected by a competent boilermaker or other qualified person, not an employe, of said operator, as often as once in every six months, and oftener if the inspector shall deem it necessary, and the result of every such inspection shall be reported on suitable blanks to said inspector.

THE POWDER HOUSE.

§ 5. All blasting powder and explosive material must be stored in a fire-proof building on the surface, located at a safe distance from all other buildings.

THE STATE MINING BOARD.

§ 6. MANNER AND PURPOSE OF APPOINTMENT.] For the purpose of securing efficiency in mine inspection service, and a high standard of qualification in those who have the management and operation of coal mines, the State Commissioners of Labor shall appoint a board of examiners, to be known as the State Mining Board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of men seeking appointments as State inspectors of mines,

and of those seeking certificates of competency as mine managers, hoisting engineers and as mine examiners.

This board shall be composed of five members, two of whom shall be practical coal miners, one an expert mining engineer, and who shall, when practicable, be also a hoisting engineer, and two shall be coal operators.

DATE AND TERM OF APPOINTMENT.] (b) Their appointment shall date from July 1, 1899, and they shall serve for a term of two years, or until their successors are appointed and qualified; they shall organize by the election of one of their number as president, and some suitable person, not a member, as secretary, after which they shall all be sworn to a faithful performance of their duties.

SUPPLIES FURNISHED BY SECRETARY OF STATE.] (c) The Secretary of State shall assign to the use of the board suitably furnished rooms in the State House for such meetings as are held at the Capitol, and shall also furnish whatever blanks, blank books, printing and stationery the board may require in the discharge of its duties.

FREQUENCY OF MEETINGS.] (d) The board shall meet at the Capitol in regular session on the second Tuesday in September of the year 1899, and biennially thereafter, for the examination of candidates for appointment as State inspectors of mines; for the examination of persons seeking certificates of competency as mine managers, hoisting engineers and mine examiners. The board shall hold meetings at such times and places within the State as shall,

in the judgment of the members, afford the best facilities to the greatest number of probable candidates. Special meetings may also be called by the Commissioners of Labor whenever, for any reason, it may become necessary to appoint one or more inspectors. Public notice shall be given through the press or otherwise, announcing the time and place at which examinations are to be held.

RULES OF PROCEDURE.] (e) The examinations herein provided for shall be conducted under such rules, conditions and regulations as the members of the board shall deem most efficient for carrying into effect the spirit and intent of this act. Such rules, when formulated, shall be made a part of the permanent record of the board and such of them as relate to candidates shall be published for their information and goverance prior to each examination; they shall also be of uniform application to all candidates.

EXAMINATIONS.

§ 7. FOR INSPECTORS.] (a) Persons coming before the State Mining Board as candidates for appointment as State Inspectors of Mines must produce evidence satisfactory to the board that they are citizens of this State, at least thirty years of age, that they have had a practical mining experience of ten years, and that they are men of good repute and temperate habits; they must also submit to and satisfactorily pass an examination as to their practical and technical knowledge of mining engineering and mining machinery and appliances, of the proper development and operation of coal mines, of

ventilation in mines, of the nature and properties of mine gases, of the geology of the coal measures in this State and of the laws of this State relating to coal mines.

NAMES CERTIFIED TO THE GOVERNOR.] (b) At the close of each examination for inspectors the board shall certify to the Governor the names of all candidates who have received a rating above the minimum fixed by the rules of the board as properly qualified for the duties of inspectors.

INSPECTORS APPOINTED.] (c) From those so named the Governor shall select and appoint seven State inspectors of mines; that is to say, one inspector for each of the seven inspection districts provided for in this act, or more, if, in the future, additional inspection districts shall be created, and their commissions shall be for a term of two years from October first: *Provided,* that any one who has satisfactorily passed two of the State examinations for inspectors, and who has served acceptably as State Inspector for two full terms, upon making written application to the board setting forth the facts, shall also be certified to the Governor as a person properly qualified for appointment. But no man shall be eligible for appointment as a State Inspector of Mines who has any pecuniary interest in any coal mine, either as owner or employe.

FOR MINE MANAGERS.] (d) Persons coming before the board for certificates of competency as mine managers must produce evidence satisfactory to the board that they are citizens of this State, at least twenty-four years of age, that they have had at least four years of practical mining experience,

and that they are men of good repute and temperate habits; they must also submit to and satisfactorily pass such an examination as to their experience in mines and in the management of men, their knowledge of mine machinery and appliances, the use of surveying and other instruments, the properties of mine gases, the principles of ventilation and the specific duties and responsibilities of mine managers, as the board shall see fit to impose.

For hoisting engineers.] (e) Persons seeking certificates of competency as hoisting engineers must produce evidence satisfactory to the board that they are citizens of the United States, at least twenty-one years of age, that they have at least two years' experience as firemen or engineer of a hoisting plant, and are of good repute and temperate habits. They must be prepared to submit to and satisfactorily pass an examination as to their experience in handling hoisting machinery, and as to their practical and technical knowledge of the construction, cleaning and care of steam boilers, the care and adjustment of hoisting engines, the management and efficiency of pumps, ropes and winding apparatus, and their knowledge of the laws of this State in relation to signals and the hoisting and lowering of men at mines.

For mine examiners.] (f) Persons seeking certificates of competency as mine examiners must produce evidence satisfactory to the board that they are citizens of this State, at least twenty-one years of age, and of good repute and temperate habits. They must be prepared to submit to and satisfactorily pass an examination as to their experience in mines

generating dangerous gases, their practical and technical knowledge of the nature and properties of fire-damp, the laws of ventilation, the structure and uses of the safety lamps, and the laws of this State relating to safeguards against fires from any source in mines.

CERTIFICATES.

§ 8. ISSUED BY THE BOARD.] (a) The certificates provided for in this act shall be issued under the signatures and seal of the State Mining Board, to all those who receive a rating above the minimum fixed by the rules of the board; such certificate shall contain the full name, age and place of birth of the recipient, and the length and nature of his previous service in or about coal mines.

REGISTER TO BE PRESERVED.] (b) The board shall make and preserve a record of the names and addresses of all persons to whom certificates are issued, and at the close of each examination shall make report of the same to the Commissioners of Labor, who shall cause a permanent register of all certificated persons to be made and kept for public inspection in the office of the State Bureau of Labor Statistics in the State capitol.

EFFECT OF CERTIFICATES.] (c) The certificates provided for in this act shall entitle the holders thereof to accept and discharge the duties for which they are thereby declared qualified, at any mine in this State where their services may be desired.

FOREIGN CERTIFICATES.] (d) The board may exercise its discretion in issuing certificates of any class, but not without examination, to persons pre-

senting, with proper credentials, certificates issued by competent authority in other states.

UNLAWFUL TO EMPLOY OTHER THAN CERTIFICATED MINE MANAGERS.] (e) It shall be unlawful for the operator of any coal mine to employ, or suffer to serve, as mine manager at his mine, any person who does not hold a certificate of competency issued by a duly authorized Board of Examiners of this State: *Provided,* that whenever any exigency arises by which it is impossible for any operator to secure the immediate services of a certified mine manager, he may place any trustworthy and experienced man, subject to the approval of the State inspector of the district, in charge of his mine, to act as temporary mine manager for a period not exceeding 30 days.

UNLAWFUL TO EMPLOY OTHER THAN CERTIFICATED HOISTING ENGINEERS.] (f) It shall be unlawful for the operator of any mine to employ, or suffer to serve, as hoisting engineer for said mine, any person who does not hold a certificate of competency issued by a duly authorized Board of Examiners of this State, or permit any other to operate his hoisting engine except for the purpose of learning to operate it, and then only in the presence of the certified engineer in charge, and when men are not being hoisted or lowered: *Provided,* that whenever any exigency arises by which it is impossible for any operator to secure the immediate services of a certificated hoisting engineer, he may place any trustworthy and experienced man, subject to the approval of the State Inspector of the district, in charge of his engines, to act as temporary engineer, for a period of not to exceed 30 days.

UNLAWFUL TO EMPLOY OTHER THAN CERTIFICATED MINE EXAMINERS.] (g) It shall be unlawful for the operator of any mine to employ, or suffer to serve, as mine examiner, any person who does not hold a certificate of competency issued by the State Mining Board: *Provided,* that any one holding a mine manager's certificate may serve as mine examiner. Any one holding a certificate as fire boss, on presentation of the same to the State Mining Board, may have it exchanged for a mine examiner's certificate.

CANCELLATION OF CERTIFICATES.] (h) The certificate of any mine manager, hoisting engineer or mine examiner may be cancelled and revoked by the State Mining Board whenever it shall be established to the satisfaction of said board that the holder thereof has become unworthy of official endorsement, by reason of violations of the law, intemperate habits, manifest incapacity, abuse of authority, or for other causes satisfactory to said board: *Provided,* that any person against whom charges or complaints are made shall have an opportunity to be heard in his own behalf. And he shall have 30 day's notice in writing of such charges.

FEES FOR EXAMINATIONS.

§ 9. An applicant for any certificate herein provided for, before being examined, shall register his name with the secretary of the board, and file with him the credentials required by this act, to-wit: an affidavit as to all matters of fact establishing his right to receive the examination, and a certificate of good character and temperate habits signed by at least ten of the citizens who know him best in the place in which he lives.

Each candidate, before receiving the examination, shall pay to the secretary of the board the sum of one dollar as an examination fee, and those who pass the examination for which they are entered, before receiving their certificates, shall also pay to the secretary the further sum of $2 each as a certificate fee. All such fees shall be duly accounted for by the board, and covered into the State treasury at the close of each fiscal year.

PAY OF THE BOARD.

§ 10. The members of the State Mining Board shall receive as compensation for their services the sum of $5 each per day, for a term not exceeding 100 days in any one year, and whatever sums are necessary to reimburse them for such traveling expenses as may be incurred in the discharge of their duties.

The salary of the secretary shall be determined by the board, but shall in no case exceed the sum of $1,000 per annum, and he shall be reimbursed for any amounts expended for actual and necessary traveling expenses in the discharge of his duties. All such salaries and expenses of the board and of its secretary shall be paid upon vouchers duly sworn to by each and approved by the president of the board and by the Governor, and the Auditor of Public Accounts is hereby authorized to draw his warrants on the State Treasury for the amounts thus shown to be due, payable out of any money in the treasury not otherwise appropriated.

INSPECTION DISTRICTS (OMITTED).

DUTIES OF INSPECTORS.

§ 12. BOND.] (a) Those who receive appointment as State Inspectors of Mines must, before entering upon their duties, as such, take an oath of office, as provided for by the constitution, and enter into a bond to the State in the sum of five thousand ($5,000) dollars, with sureties to be approved by the Governor, conditioned upon the faithful performance of their duties in every particular as required by this act; said bond, with the approval of the Governor endorsed thereon, together with the oath of office, shall be deposited with the Secretry of State.

INSTRUMENTS.] (b) For the more efficient discharge of the duties herein imposed upon them, each inspector shall be furnished at the expense of the State with an anemometer, a safety lamp and whatever other instruments may be required in order to carry into effect the provisions of this act.

EXAMINATIONS OF MINES.] (c) State Inspectors of Mines shall devote their whole time and attention to the duties of their office, and make personal examination of every mine within their respective districts, and shall see that every necessary precaution is taken to insure the health and safety of the workmen employed in such mines, and that the provisions and requirements of all the mining laws of this State are faithfully observed and obeyed, and the penalties for the violation of the same promptly enforced.

AUTHORITY TO ENTER.] (d) It shall be lawful for State Inspectors to enter, examine and inspect any and all coal mines and the machinery belonging thereto, at all reasonable times, by day or by night, but so as not to obstruct or hinder the necessary workings of such coal mine, and the operator of every such coal mine is hereby required to furnish all necessary facilities for making such examination and inspection.

PROCEDURE IN CASE OF OBJECTION.] (e) If any operator shall refuse to permit such inspection or to furnish the necessary facilities for making such examination and inspection, the inspector shall file his affidavit, setting forth such refusal, with the judge of the circuit court in said county in which said mine is situated, either in term time or vacation, or, in the absence of said judge, with the master in chancery in said county in which said mine is situated, and obtain an order on such owner, agent or operator so refusing as aforesaid, commanding him to permit and furnish such necessary facilities for the inspection of such coal mine, or to be adjudged to stand in contempt of court and punished accordingly.

NOTICES TO BE POSTED.] (f) The State Inspector of Mines shall post up in some conspicuous place at the top of each mine visited and inspected by him, a plain statement of the condition of said mine, showing what in his judgment is necessary for the better protection of the lives and health of persons employed in said mine; such statement shall give the date of inspection and be signed by the inspector. He shall also post a notice at the landing used by

the men, stating what number of men will be permitted to ride on the cage at one time, and at what rate of speed men may be hoisted and lowered on the cages. He must observe especially that a proper code of signals between the engineer and top man and bottom man is established and conspicuously posted for the information of all employes.

SEALER OF WEIGHTS.] (g) State Inspectors of Mines are hereby made *ex officio* sealer of weights and measures in their respective districts, and as such are empowered to test all scales used to weigh coal at coal mines. Upon the written request of any mine owner or operator, or of ten coal miners employed at any one mine, it shall be his duty to try and prove any scale or scales at such mine against which complaint is directed, and if he shall find that they or any of them do not weigh correctly, he shall call the attention of the mine owner or operator to the fact, and direct that said scale or scales be at once overhauled and readjusted so as to indicate only true and exact weights, and he shall forbid the further operation of such mine until such scales are adjusted. In the event that such tests shall conflict with any test made by any county sealer of weights, or under and by virtue of any municipal ordinance or regulation, then the test by such mine inspector shall prevail.

TEST WEIGHTS.] (h) For the purpose of carrying out the provisions of this act each inspector shall be furnished by the State with a complete set of standard weights suitable for testing the accuracy of track scales, and of all smaller scales at mines; said test weights to be paid for on bills of particu-

lars, certified by the Secretary of State and approved by the Governor. Such test weights shall remain in the custody of the inspector for use at any point within his district, and for any amounts expended by him for the storage, transportation or handling of the same, he shall be fully reimbursed upon making entry of the proper items in his quarterly expense voucher.

INSPECTORS' ANNUAL REPORTS.] (i) Each State Inspector of Mines shall, at the close of the official year, to-wit: After June 30, of every year, prepare and forward to the secretary of the Bureau of Labor Statistics a formal report of his acts during the year in the discharge of his duties, with any recommendations as to legislation he may deem necessary on the subject of mining, and shall collect and tabulate upon blanks furnished by said secretary all desired statistics of mines and miners within his district to accompany said annual report.

REPORTS TO BE PUBLISHED.] (j) On the receipt of said inspectors' reports the secretary of the Bureau of Labor Statistics shall proceed to compile and summarize the same as a report of said bureau, to be known as the Annual Coal Report, which shall be duly transmitted to the Governor for the information of the General Assembly and the public. The printing and binding of said reports shall be provided for by the Commissioners of State Contracts in like manner and in like number as they provide for the publication of other official reports to the Governor.

The Secretary of State shall furnish to said inspectors, upon the requisition of the secretary of

the State Bureau of Labor Statistics, whatever instruments, blanks, blank books, stationery, printing and supplies may be required by said inspectors in the discharge of their official duties; said instruments to be paid for on bills of particulars, certified by the Secretary of State and approved by the Governor.

It shall be the duty of every coal operator and every employer of labor in this State to afford the State Commissioners of Labor, or their representatives, every facility for procuring statistics of the wages and conditions of their employes for the purpose of compiling and publishing statistics of labor and of social and industrial conditions within the State as required by law. Any person who shall hinder or obstruct the investigation of the agents of the commissioners, or shall neglect or refuse, for a period of ten days, to furnish the information called for by the schedules of the commissioners as provided above, shall be adjudged guilty of a misdemeanor and be subjected to a fine of $100.

§ 13. Each State Inspector of Mines shall receive as compensation for his services the sum of $1,800 per annum, and for his traveling expenses the sum actually expended for that purpose, in the discharge of his official duties, both to be paid quarterly by the State Treasurer, on warrants of the Auditor of Public Accounts, from the funds in the treasury not otherwise appropriated; said expense vouchers shall show the items of expenditures in detail, with sub-vouchers for the same so far as it is practicable to obtain them. Said voucher shall be sworn to by the inspector and be approved by

the secretary of the Bureau of Labor Statistics and the Governor.

REMOVAL OF INSPECTORS.

§ 14. Upon a petition signed by not less than three coal operators, or ten coal miners, setting forth that any State Inspector of Mines neglects his duties, or that he is incompetent, or that he is guilty of malfeasance in office, or guilty of any act tending to the injury of miners or operators of mines, it will be lawful for the Commissioners of Labor of this State to issue a citation to the said inspector to appear, at not less than fifteen days' notice on a day fixed before them, when the said commissioners shall proceed to inquire into and investigate the allegations of the petitioners, and if the said commissioners find that the said inspector is neglectful of his duty, or that he is incompetent to perform the duties of said office, or that he is guilty of malfeasance in office, or guilty of any act tending to the injury of miners or operators of mines, the said commissioners shall declare the office of inspector of said district vacant, and a properly qualified person shall be duly appointed, in the manner provided for in this act, to fill said vacancy.

COUNTY INSPECTORS.

§ 15. The County Board of Supervisors, or of Commissioners in counties not under township organization, of any county in which coal is produced, upon the written request of the State Inspector of Mines for the district in which said county is located, shall appoint a County Inspector of Mines

as assistant to such State inspector; but no person shall be eligible for appointment as county inspector who does not hold a State certificate of competency as mine manager, and the compensation of such county inspector shall be fixed by the county board at not less than three dollars per day, to be paid out of the county treasury.

The State inspector may authorize any county inspector in his district to assume and discharge all the duties and exercise all the powers of a State inspector in the county for which he is appointed, in the absence of the State inspector; but such authority must be conferred in writing and the county inspector must produce the same as evidence of his powers upon the demand of any person affected by his acts; and the bond of said State inspector shall be holden for the faithful performance of the duties of such assistant inspector.

DUTIES OF MINE MANAGERS AND MINERS.

§ 16. (a) The mine manager shall instruct employes as to their respective duties, and shall visit and examine the various working places in the mine as often as practicable. He shall always provide a sufficient supply of props, caps and timber delivered on the miners' cars at the usual place where demanded, as nearly as possible, in suitable lengths and dimensions for the securing of the roof by the miners, and it shall be the duty of the miner to properly prop and secure his place with materials provided therefor.

VENTILATION.] (b) It shall be the duty of the

mine manager to see that cross-cuts are made at proper distances apart to secure the best ventilation at the face of all working places, and that all stoppings along air-ways are properly and promptly built. He shall keep careful watch over all ventilating apparatus and the air-currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed or stopped, he shall at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established.

AIR CURRENTS AND OUTLET PASSAGE-WAYS.] (c) He shall measure or cause to be measured the air-current with an anemometer at least once a week at the inlet and outlet, and shall keep a record of such measurements for the information of the inspector. Once a week he shall make a special examination of the roadways leading to the escapement shaft or other opening for the safe exit of men to the surface, and shall make a record of any obstructions to travel he may encounter therein, together with the date of their removal.

HANDLING EXPLOSIVES.] (d) He shall give special attention to and instructions concerning the proper storage and handling of explosives in the mine, and concerning the time and manner of placing and discharging the blasting shots, and it shall be unlawful for any miner to fire shots except according to the rules of the mine. In dusty mines he must see that all hauling roads are frequently and thoroughly sprinkled. He must also see that all dangerous places, above and below, are properly marked, and that danger signals are displayed wherever they are required.

CARE OF ROPES, CAGES, ETC.] (e) The mine manager or superintendent must have special attention given to the condition of the hoisting ropes; they must be carefully and frequently scrutinized. Before the men are lowered in the morning the soundness of the ropes must be tested by hoisting the cages. He must also have the cages, safety catches, pumps, sumps and stables examined frequently; he must have the mine examined every morning by the mine examiner before the men are allowed to go to work, and know that the top man and bottom man are on duty, and that sufficient lights are maintained at the top and bottom landings when the men are being hoisted and lowered.

EARLY AND LATE DUTY.] (f) The mine manager or his agent shall be at his post at the mine when the men are lowered into the mine in the morning for work; he shall by some device keep a record of the number of men lowered either for day or night shift, and he or his agent shall remain at night until all the men employed during the day shall have been hoisted out.

MAY HAVE ASSISTANTS.] (g) In mines in which the works are so extensive that all the duties devolving on the mine manager cannot be discharged by one man, competent persons may be designated and appointed as assistants to the mine manager who shall exercise his functions, under his instructions.

DUTIES OF HOISTING ENGINEERS.

§ 17. CONSTANT ATTENDANCE.] (a) The hoisting engineer at any mine, shall be in constant attendance

at his engine or boilers at all times when there are workmen underground.

Outsiders excluded.] (b) The engineer shall not permit any one to enter or to loiter in the engine room, except those authorized by their position or duties to do so, and he shall hold no conversation with any officer of the company or other person while the engine is in motion or while his attention is occupied with the signals. A notice to this effect shall be posted on the door of the engine house.

Care of engine and boilers.] (c) The engineer or some other properly authorized employe must keep a careful watch over the engine, boilers, pumps, ropes and winding appartus. He must see that his boilers are properly supplied with water, cleaned and inspected at frequent intervals, and that the steam pressure does not exceed the limit established by the boiler inspector; he shall frequently try the safety valves and shall not increase the weights on the same; he shall observe that the steam and water gauges are always in good order, and if any of the pumps, valves or gauges become deranged or fail to act he shall promptly report the fact to the proper authority.

Signals.] (d) The engineer must thoroughly understand the established code of signals, and these must be delivered in the engine room in a clear and unmistakable manner, and when he has the signal that men are on the cage he must work his engine only at the rate of speed hereafter specified in this act.

HANDLING OF ENGINE.] (e) The engineer shall permit no one to handle or meddle with any machinery under his charge, nor suffer any one who is not a certificated engineer to operate his engine, except for the purpose of learning to operate it, and then only in the presence of the engineer in charge, and when men are not on the cage.

DUTIES OF MINE EXAMINERS.

§ 18. TO ENTER AND EXAMINE ALL PLACES.] (a) A mine examiner shall be required at all mines. His duty shall be to visit the mine before the men are permitted to enter it, and, first, he shall see that the air-current is traveling in its proper course and in proper quantity. He shall then inspect all places where men are expected to pass or to work and observe whether there are any recent falls or obstructions in rooms or roadways, or accumulations of gas or other unsafe conditions. He shall especially examine the edges and accessible parts of recent falls and old gobs and air-courses. As evidence of his examination of all working places, he shall inscribe on the walls of each, with chalk, the month and the day of the month of his visit.

TO POST DANGER NOTICES.] (b) When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager.

No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work

therein, except under the direction of the mine manager, until all conditions shall have been made safe.

To MAKE DAILY RECORD.] (c) The mine examiner shall make a daily record of the conditions of the mine, as he has found it, in a book kept for that purpose, which shall be preserved in the office for the information of the company, the inspector and all other persons interested, and this record shall be made each morning before the miners are permitted to descend into the mine.

VENTILATION.

§ 19. Throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and such ventilation shall be produced by a fan, or some other artificial means.

AMOUNT OF AIR REQUIRED.] (a) The quantity of air required to be kept in circulation and passing a given point shall be not less than 100 cubic feet per minute for each person and not less than 600 cubic feet per minute for each animal in the mine, measured at the foot of the downcast, and this quantity may be increased at the discretion of the inspector whenever, in his judgment, unusual conditions make a stronger current necessary. Said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of every kind.

MEASUREMENTS.] (b) The measurement of the currents of air shall be taken with an anemometer at the foot of the downcast, at the foot of the up-

cast and at the working face of each division or split of the air current. And a record of such measurements shall be made and preserved in the office, as elsewhere provided for in this act.

AIR-CURRENTS TO BE SPLIT.] (c) The main current of air shall be so split, or subdivided, as to give a separate current of reasonably pure air to every 100 men at work, and the inspector shall have authority to order separate currents for smaller groups of men, if, in his judgment, special conditions make it necessary.

VENTILATION OF STABLE.] (d) The air current for ventilating the stable shall not pass into the intake air current for ventilating the working parts of the mine.

SELF-CLOSING DOORS.] (e) All permanent doors in mines used in guiding and directing ventilating currents shall be so hung and adjusted as to close automatically.

TRAPPERS.] (f) At all principal door-ways, through which cars are hauled, an attendant shall be employed for the purpose of opening and closing said doors when trips of cars are passing to and from the workings. Places for shelter shall be provided at such door-ways to protect the attendants from being injured by the cars while attending to their duties.

CROSS-CUTS.] (g) Cross-cuts shall be made not more than 60 feet apart, and no room shall be opened in advance of the air current.

STOPPINGS.] (h) When it becomes necessary to close cross-cuts connecting the inlet and outlet air-

courses in mines generating dangerous gases, the stoppings shall be built in a substantial manner with brick or other suitable building material laid in mortar or cement, if practicable, but in no case shall they be built of lumber except for temporary purposes.

AUTHORITY OF INSPECTOR.] (i) Whenever the inspector shall find men working without sufficient air, he shall at once give the mine manager or operator notice and a reasonable time in which to restore the current, and upon his or their refusal or neglect to act promptly, the inspector may order the endangered men out of the mine.

POWDER AND BLASTING.

§ 20. No blasting powder or other explosive shall be stored in any coal mine, and no workman shall have at any time more than one 25-pound keg of black powder in the mine, nor more than three pounds of high explosives.

PLACE AND MANNER OF STORING.] (a) Every person who has powder or other explosives in a mine shall keep it or them in a wooden or metallic box or boxes securely locked, and said boxes shall be kept at least ten feet from the track, and no two powder boxes shall be kept within 50 feet of each other, nor shall black powder and high explosives be kept in the same box.

MANNER OF HANDLING.] (b) Whenever a workman is about to open a box or keg containing powder or other explosives, and while handling same he shall place and keep his lamp at least five feet dis-

tant from said explosive and in such a position that the air current cannot convey sparks to it, and no person shall approach nearer than five feet to any open box containing powder or other explosive with a lighted lamp, lighted pipe or other thing containing fire.

COPPER TOOLS.] (c) In the process of charging and tamping a hole no person shall use any iron or steel pointed needle. The needle used in preparing a blast shall be made of copper and the tamping bar shall be tipped with at least five inches of copper. No coal dust nor any material that is inflammable or that may create a spark shall be used for tamping, and some soft material must always be placed next to the cartridge or explosive.

USE OF SQUIBS.] (d) A miner who is about to explode a blast with a manufactured squib shall not shorten the match, saturate it with mineral oil nor ignite it except at the extreme end; he shall see that all persons are out of danger from the probable effects of such shot, and shall take measures to prevent any one approaching, by shouting "fire!" immediately before lighting the fuse.

NOT MORE THAN ONE SHOT AT A TIME.] (e) Not more than one shot shall be ignited at the same time in any one working place, unless the firing is done by electricity or by fuses of such length that neither of the shots will explode in less than 3 minutes from the time they are lighted. When successive shots are to be fired in any working place in which the roof is broken or faulty, the smoke must be allowed to clear away and the roof must be examined and made secure between shots.

MISSED SHOTS.] (f) No person shall return to a missed shot until 5 minutes shall have elapsed, unless the firing is done by electricity, and then only when the wires are disconnected from the battery.

DUSTY MINES.] (g) In case the galleries, roadways or entries of any mine are so dry that the air becomes charged with dust, the operator of such mine must have such roadways regularly and thoroughly sprayed, sprinkled or cleaned, and it shall be the duty of the inspector to see that all possible precautions are taken against the occurrence of explosions which may be occasioned or aggravated by the presence of dust.

PLACES OF REFUGE.

§ 21. ENGINE PLANES.] (a) On all single track hauling roads wherever hauling is done by machinery, and on all gravity or inclined planes in mines, upon which the persons employed in the mine must travel on foot to and from their work, places of refuge must be cut in the side wall not less than 3 feet in depth and 4 feet wide, and not more than 20 yards apart, unless there is a clear space of at least 3 feet between the side of the car and the side of the road, which space shall be deemed sufficient for the safe passage of men.

On every such road which is more than 100 feet in length a code of signals shall be established between the hauling engineer and all points on the road.

A conspicuous light must be carried on the front car of every trip or train of pit cars moved by machinery, except when such trip is on an inclined plane.

HAULING ROADS.] (b) On all hauling roads or gangways on which the hauling is done by draft animals, or gangways whereon men have to pass to and from their work, places of refuge must be cut in the side wall at least 2½ feet deep, and not more than 20 yards apart; but such places shall not be required in entries from which rooms are driven at regular intervals not exceeding 20 yards, and whenever there is a clear space of two and one-half feet between the car and the rib, such space shall be deemed sufficient for the safe passage of men.

All places of refuge must be kept clear of obstructions, and no material shall be stored nor be allowed to accumulate therein.

BOYS AND WOMEN.

§ 22. No boy under the age of fourteen years, and no woman or girl of any age shall be permitted to do any manual labor in or about any mine, and before any boy can be permitted to work in any mine he must produce to the mine manager or operator thereof an affidavit from his parent or guardian or next of kin, sworn and subscribed to before a justice of the peace or notary public, that he, the said boy, is fourteen years of age.

SIGNALS.

§ 23. At every mine operated by shaft and by steam power means must be provided for communicating distinct and separate signals to and from the bottom man, the top man and the engineer. The following signals are prescribed for use at mines where signals are required:

From the Bottom to the Top. One bell shall signify to hoist coal or the empty cage, and also to stop either when in motion.

Two bells shall signify to lower cage.

Three bells shall signify that men are coming up; when return signal is received from the engineer, men will get on the cage and the cager shall ring one bell to start.

Four bells shall signify to hoist slowly, implying danger.

Five bells shall signify accident in the mine and a call for a stretcher.

Six bells shall call for a reversal of the fan.

From the Top to the Bottom. One bell shall signify: All ready, get on cage.

Two bells shall signify: Send away empty cage.

Provided, that the operator of any mine may, with the consent of the inspector, add to this code of signals in his discretion, for the purpose of increasing its efficiency or of promoting the safety of the men in said mine, but whatever code may be established and in use at any mine, must be conspicuously posted at the top and at the bottom and in the engine room for the information and instruction of all persons concerned.

WEIGHING AND WEIGHMEN.

§ 24. SCALES.] (a) The operator of every coal mine where miners are paid by the weight of their output shall provide at such mine suitable and accurate scales of standard manufacture for the weighing of such coal, and a correct record shall be

kept of all coal so weighed, and said record shall be open at all reasonable hours to the inspection of miners and others interested in the product of said mine.

WEIGHMAN.] (b) The person authorized to weigh the coal and keep the record as aforesaid shall, before entering upon his duties, make and subscribe to an oath before some person duly authorized to administer oaths, that he will accurately weigh and carefully keep a true record of all coal weighed, and such affidavit shall be kept conspicuously posted at the place of weighing.

CHECK WEIGHMAN.] (c) It shall be permitted to the miners at work in any coal mine to employ a check-weighman at their option and at their own expense, whose duty it shall be to balance the scales and see that the coal is properly weighed, and that a correct account of the same is kept, and for this purpose he shall have access at all times to the beam box of said scales, and be afforded every facility for verifying the weights while the weighing is being done. The check-weighman so employed by the miners, before entering upon his duties, shall make and subscribe to an oath before some person duly authorized to administer oaths, that he will faithfully discharge his duties as check-weighman and such oath shall be kept conspicuously posted at the place of weighing.

BOUNDARIES.

§ 25. TEN-FOOT LIMIT.] (a) In no case shall the workings of any mine be driven nearer than 10 feet to the boundary line of the coal rights pertaining to

said mine, except for the purpose of establishing an underground communication between contiguous mines, as provided for elsewhere in this act.

APPROACHING OLD WORKS.] (b) Whenever the workings of any part of a mine are approaching old workings, believed to contain dangerous accumulations of water or of gas, the operator of said mine must conduct the advances with narrow work, and maintain bore holes at least 20 feet in advance of the face of the work, and such side holes as may be deemed prudent or necessary.

NOTICE TO INSPECTORS.

§ 26. Immediate notice must be conveyed to the inspector of the proper district by the operator interested:

First—Whenever an accident occurs whereby any person receives serious or fatal injury.

Second—Whenever it is intended to sink a shaft, either for hoisting or encampment purposes, or to open a new mine by any process.

Third—Whenever it is intended to abandon any mine or to reopen any abandoned mine.

Fourth—Upon the appearance of any large body of fire damp in any mine, whether accompanied by explosion or not, and upon the occurrence of any serious fire within the mine or on the surface.

Fifth—When the workings of any mine are approaching dangerously near any abandoned mine, believed to contain accumulations of water or gas.

Sixth—Upon the accidental closing or intended abandonment of any passageway to an escapement outlet.

ACCIDENTS.

§ 27. DUTY OF INSPECTOR.] (a) Whenever loss of life or serious personal injury shall occur by reason of any explosion, or of any accident whatsoever, in or connected with any coal mine, it shall be the duty of the person having charge of said mine to report that fact, without delay, to the inspector of the district in which the mine is located, and the said inspector shall, if he deem necessary from the facts reported, and in all cases of loss of life, immediately go to the scene of said accident and render every possible assistance to those in need.

It shall, moreover, be the duty of every operator of a coal mine to make and preserve for the information of the inspector, and upon uniform blanks furnished by said inspector, a record of all injuries sustained by any of his employes in the pursuance of their regular occupations.

CORONER'S INQUEST.] (b) If any person is killed by an explosion, or other accident, the operator must also notify the coroner of the county, or in his absence or inability to act, any justice of the peace of said county, for the purpose of holding an inquest concerning the cause of such death. At such inquest the inspector shall offer such testimony as he may be possessed of, and may question or cross-question any witness appearing in the case.

INVESTIGATION BY INSPECTOR.] (c) The inspector may also make any original or supplemental investigation which he may deem necessary, as to the nature and cause of any accident within his jurisdiction, and shall make a record of the circumstances

attending the same, and of the result of his investigations, for preservation in the files of his office. To enable him to make such investigation he shall have power to compel the attendance of witnesses, and to administer oaths or affirmations to them, and the cost of such investigations shall be paid by the county in which such accident has occurred, in the same manner as the costs of coroner's inquests are paid.

MEN ON CAGES.

§ 28. TOP MAN AND BOTTOM MAN.] (a) At every shaft operated by steam power, the operator must station at the top and at the bottom of such shaft a competent man, charged with the duty of attending to signals, preserving order and enforcing the rules governing the carriage of men on cages. Said top man and bottom man shall be at their respective posts of duty at least a half hour before the hoisting of coal begins in the morning, and remain for half an hour after hoisting ceases for the day.

LIGHTS ON LANDINGS.] (b) Whenever the hoisting or lowering of men occurs before daylight or after dark, or when the landing at which men take or leave the cage is at all obscured by steam or otherwise, there must always be maintained at such landing a light sufficient to show the landing and surrounding objects distinctly. Likewise, as long as there are men underground in any mine, the operator shall maintain a good and sufficient light at the bottom of the shaft thereof, so that persons coming to the bottom may clearly discern the cage and objects in the vicinity.

SPEED OF CAGES AND OTHER REGULATIONS.] (c) Cages on which men are riding shall not be lifted nor lowered at a rate of speed greater than 600 feet per minute, except with the written consent of the inspector. No person shall carry any tools, timber or other materials with him on a cage in motion, except for use in repairing the shaft, and no one shall ride on a cage containing either a loaded or empty car. No cage having an unstable or self-dumping platform shall be used for the carriage of men or materials unless the same is provided with some convenient device by which said platform can be securely locked, and unless it is so locked whenever men or materials are being conveyed thereon. No coal shall be hoisted in any shaft while men are being lowered therein.

RIGHTS OF MEN TO COME OUT.] (d) Whenever men who have finished their day's work, or have been prevented from further work, shall come to the bottom to be hoisted out, an empty cage shall be given them for that purpose, unless there is an available exit by slope or by stairway in an escapement shaft, and providing there is no coal at the bottom ready to be hoisted.

SAFETY LAMPS.

§ 29. OPERATOR MUST FURNISH.] (a) At any mine where the inspector shall find the fire-damp is being generated so as to require the use of a safety lamp in any part thereof, the operator of such mine, upon receiving notice from the inspector that one or more such lamps are necessary to the safety of the men in such mine, shall at once procure and keep

for use such number of safety lamps as may be necessary.

MINE MANAGER MUST CARE FOR.] (b) All safety lamps used for examining mines or for working therein shall be the property of the operator, and shall remain in the custody of the mine manager, or other competent person, who shall clean, fill, trim, examine and deliver the same, locked and in a safe condition, to the men, upon their request, when entering the mine, and shall receive the same from the men at the end of their shift. But miners shall be responsible for the condition and proper use of safety lamps when in their possession.

STRETCHERS AND BLANKETS.

§ 30. At every mine where fifty men are employed underground it shall be the duty of the operator thereof to keep always on hand, and at some readily accessible place, a properly constructed stretcher, a woolen and waterproof blanket, and a roll of bandages in good condition and ready for immediate use for binding, covering and carrying any one who may be injured at the mine. When two hundred or more men are employed in any mine, two stretchers and two woolen and two waterproof blankets, with a corresponding supply of bandages, shall be provided and kept on hand. At mines where fire-damp is generated there shall also be provided and kept in store a suitable supply of linseed or olive oil, for use in case men are burned by an explosion.

CAUTION TO MINERS.

§ 31. AGAINST DOING UNLAWFUL ACTS.] It shall be unlawful for any miner, workman or other person knowingly or carelessly to injure any shaft, safety lamp, instrument, air-course or brattice, or to obstruct or throw open any air-way, or carry any open lamp or lighted pipe or fire in any form into any place worked by the light of safety lamps, or within five feet of any open powder, or to handle or disturb any part of the hoisting machinery, or open any door regulating an air-current and not close the same, or to enter any part of the mine against caution, or to use other than copper needles and copper-tipped tamping bars, or to disobey any order given in pursuance of this act, or to do any wilful act whereby the lives or health of persons working in mines or the security of the mine or machinery thereof is endangered.

§ 32. OPERATOR TO POST RULES—LEGAL NOTICE OF CONTENTS.] It shall be the duty of every operator to post, on the engine house and at the pit top of his mine, in such manner that the employes in the mine can read them, rules not inconsistent with this act, plainly printed in the English language, which shall govern all persons working in the mine. And the posting of such notice, as provided, shall charge all employes of such mine with legal notice of the contents thereof.

PENALTIES.

§ 33. FOR VIOLATING THIS ACT.] Any wilful neglect, refusal or failure to do the things required to be done by any section, clause or provision of this

act, on the part of the *person or persons herein required to do them,* or any violation of any of the provisions or requirements hereof, or any attempt to obstruct or interfere with any inspector in the discharge of the duties herein imposed upon him, or any refusal to comply with the instructions of an inspector given by authority of this act, shall be deemed a misdemeanor punishable by a fine not exceeding $500, or by imprisonment in the county jail for a period not exceeding six months, or both, at the discretion of the court: *Provided,* that in addition to the above penalties, in case of the failure of any operator to comply with the provisions of this act in relation to the sinking of escapement shafts and the ventilation of mines, the state's attorney for the county in which such failure occurs, or any other attorney, in case of his neglect to act promptly, shall proceed against such operator by injunction without bond, to restrain him from continuing to operate such mine until all legal requirements shall have been fully complied with.

Any inspector who shall discover that any section of this act, or part thereof, is being neglected or violated, shall order immediate compliance therewith, and in case of continued failure to comply, shall, through the state's attorney, or any other attorney, in case of his failure to act promptly, take the necessary legal steps to enforce compliance therewith through the penalties herein prescribed.

If it becomes necessary, through the refusal or failure of the state's attorney to act, for any other attorney to appear for the State in any suit involving the enforcement of any provision of this

act, reasonable fees for the services of such attorney shall be allowed by the board of supervisors, or county commissioners, in and for the county in which such proceedings are instituted.

For any injury to person or property, occasioned by any wilful violations of this act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and, in case of loss of life by reason of such wilful violation or wilful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of $5,000.

DEFINITIONS.

§ 34. MINE.] (a) In this act the words "mine" and "coal mine," used in their general sense, are intended to signify any and all parts of the property of a mining plant, on the surface or underground, which contribute, directly or indirectly, under one management, to the mining or handling of coal.

EXCAVATIONS OR WORKINGS.] (b) The words "excavations" and "workings" signify any and all parts of a mine excavated or being excavated, including shafts, tunnels, entries, rooms and working places, whether abandoned or in use.

SHAFT.] (c) The term "shaft" means any vertical opening through the strata which is or may be used for purposes of ventilation or escapement, or for the hoisting or lowering of men and material in connection with the mining of coal.

SLOPE OR DRIFT.] (d) The term "slope" or "drift" means any inclined or horizontal way, opening or tunnel to a seam of coal to be used for the same purposes as a shaft.

OPERATOR.] (e) The term "operator," as applied to the party in control of a mine in this act, signifies the person, firm or body corporate who is the immediate proprietor as owner or lessee of the plant, and, as such, responsible for the condition and management thereof.

INSPECTOR.] (f) The term "inpsector" in this act signifies the State Inspector of Mines, within and for the district to which he is appointed.

MINE MANAGER.] (g) The "mine manager" is the person who is charged with the general direction of the underground work, or both the underground and outside work of any coal mine, and who is commonly known and designated as the "mine boss," or "foreman" or "pitboss."

MINE EXAMINER.] (h) The "mine examiner" is the person charged with the examination of the condition of the mine before the miners are permitted to enter it, and who is commonly known, and has been designated in former enactments as the "fireboss."

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No. 139.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,
vs.
MINNIE FULTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Suggestions in Opposition to Motion to Dismiss Appeal and Affirm Judgment.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
ATTORNEYS FOR PLAINTIFF IN ERROR

BARNARD & MILLER, PRINTERS, CHICAGO

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Suggestions in Opposition to Motion to Dismiss Appeal and Affirm Judgment.

MAY IT PLEASE THE COURT:

The sole question presented by this motion to dismiss is that of *jurisdiction.* If "the Constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States," then, under Section 5 of the Court of Appeals Act of March 3, 1891, this court has jurisdiction to review this record. Such jurisdiction does not depend upon the soundness or unsoundness of plaintiff in error's contention as to the constitutional question raised, nor is this court limited in its review to a consideration of such constitutional question only. It may uphold the constitutionality of the statute complained of and yet reverse the judgment upon other errors assigned, provided always, of course, that

the claim of contravention is not a frivolous one, a mere claim in words only, but real and substantial.

Tested by these familiar principles, what lack of jurisdiction can be discerned upon this record, even if we admit, for the sake of the argument, that the whole case hangs upon the first count of the declaration?

In the face of defendant's request for instructions to the jury, first, to return a verdict of "not guilty," on the ground that the Mining Act of Illinois "upon which *this action* is based and upon which *each of the counts* is based," is contrary to the Fourteenth Amendment, etc. (Rec., 92), and, second, that plaintiff could not recover under the *first* of the eighth counts of her declaration upon which this action proceeds for the reason that the provisions of the Illinois Mining Act, upon which said count is based, are contrary to the Constitution of the United States (Rec., 105), it will not be asserted, nor even suggested, we think, that the defendant did not *claim* that a state law upon which this first count rested was in contravention of the Constitution of the United States. That this claim was not a frivolous one, but real and substantial, appears from the nature of the claim itself, and no argument can make it clearer. It is totally unlike the claims asserted in *Western Union Tel. Co.* v. *Ann Arbor R. R. Co.*, 178 U. S., 239, and *Lampasas* v. *Bell*, 180 U. S., 276, and other cases cited by counsel. In the *Western Union* case the court pointed out that whether the suit arose "under the Constitution and laws of the United States" depended on complainant's statement of its own case, and, fur-

ther, that, upon reference to the bill, it was evident that the case was framed wholly upon the theory of a threatened breach of contract and not upon a right conferred by a federal statute. This case was, moreover, *reversed upon full hearing*, and not dismissed on motion. In the *Lampasas* case the suit was dismissed, not upon the ground that no constitutional question had been raised, but because the plaintiff in error had no legal interest in the constitutional question before the court. No such question arises in the case at bar, in which defendant's liability can be fixed only after an adjudication upon the constitutionality of the Illinois Mining Act adverse to its contention. If further light is needed upon the reality and *bona fides* of this claim that a constitutional question is involved, it is to be found in the fact that the highest court in Pennsylvania, as pointed out in our original brief, has pronounced a statute of that State, substantially similar to that now under consideration, unconstitutional, upon the exact ground relied upon in this case.

The real basis of this motion to dismiss is, that, *in the opinion of counsel for defendant in error*, the first count is not open to the charge of unconstitutionality brought against it, however sound such charge may be as to the other seven. But this charge has been made against the first count in common with the others, and supported by every argument at our command, and the soundness of counsel's contention can only be determined after this court has analyzed the Mining Act and determined upon whom the duties involved in the first count are placed, and after it has further determined, should it find

that such duties are imposed upon the owner, whether the unconstitutional features involved in the other seven counts do not invalidate the entire act, so as to exclude the possibility of a cause of action being based upon any of its provisions. In other words, the court must assume jurisdiction of the case in order to determine the questions at the basis of this motion, which counsel assume to decide in their own favor, and will then affirm or reverse the judgment upon the merits not only of the constitutional question raised, but of every other question of error properly assigned upon the record.

We deem it unnecessary to discuss the questions raised by counsel regarding the Illinois Practice Act, as they relate to the affirmance or reversal of a case upon the merits, and not to any question of jurisdiction here involved, and do not eliminate the substantial claim of unconstitutionality aimed against the first count, which is decisive upon this motion.

We append a brief reference to cases in this court which lay down the principles of law above stated, and in view of the argument advanced in support of the motion to dismiss to the effect that the first count is based upon duties imposed on the owner or operator, and not upon the mine officials, we conclude with an amplification of our former statement upon that point, found at page 4 of our original brief. The court's instruction (Rec., 96) referred to in such former statement, either requested or acquiesced in by plaintiff at the time, induced the belief that counsel's views accorded with our own upon that proposition.

THE JURISDICTION OF THIS COURT DEPENDS UPON THE EXISTENCE OF A SUBSTANTIAL CLAIM THAT A STATE LAW IS IN CONTRAVENTION OF THE CONSTITUTION OF THE UNITED STATES, AND NOT UPON THE SOUNDNESS OF SUCH CLAIM. WHEN JURISDICTION IS SO ACQUIRED THE COURT WILL CONSIDER ALL QUESTIONS PROPERLY RAISED UPON THE RECORD.

In *Holder* v. *Aultman*, 169 U. S., at pages 88-89, this court said:

> "This was, therefore, a 'case in which the Constitution or law of a State is claimed to be in contravention of the Constitution of the United States,' and was rightly brought directly to this court by writ of error under the Act of March 3, 1891, C. 517, Sec. 5. Upon such a writ of error, differing in these respects from a writ of error to the highest court of a State, the jurisdiction of this court does not depend upon the question whether the right claimed under the Constitution of the United States has been upheld or denied in the court below, and the jurisdiction of this court is not limited to the constitutional question but includes the whole case. *Whitten* v. *Tomlinson*, 160 U. S., 231, 238; *Penn Ins. Co.* v. *Austin*, 168 U. S., 685.
>
> "But this court has not found it necessary to pass upon the constitutional question because it is of opinion that the contract was not within the statute set up by the defendant."

The court having thus acquired jurisdiction of the case by reason of the claim that the Michigan statute in question was in contravention of the Constitution of the United States, proceeded to dispose of the case solely upon the other grounds than that of constitutionality presented by the record.

In *Penn Ins. Co.* v. *Austin,* 168 U. S., 685, cited in the *Aultman* case, *supra,* it is said at page 695:

> "But the words of the statute, which empower this court to review directly the action of the Circuit Court, are that such power shall exist wherever it is claimed on the record that a law of a State is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is, not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. *But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case.* The authorities referred to as supporting the position indicate that the argument is the result of a confusion of thought, and that it arises from confounding the power of this court to review on a writ of error the action of a state court with the power exercised by this court, under the Act of 1891, to review by direct appeal the final action of the Circuit Court where, on the face of the record, it appears that the claim was made that the statute of a State contravened the Constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record. *Horner* v. *United States,* 143 U. S., 570."

In *Loeb* v. *Columbia Township Trustees,* 179 U. S., 477, it is said by the court in discussing the

right of plaintiff in error to bring the case directly from the Circuit Court:

"By the fifth section of the Circuit Court of Appeals Act of March 3, 1891, appeals or writs of error may be prosecuted to this court from the Circuit Court '*in any case* in which the Constitution or law of a State is *claimed* to be in contravention of the Constitution of the United States.'" (The italics are those of the court.) "It is said that even if the record shows such a claim to have been made, it will not avail the plaintiff; for, it is argued, when the jurisdiction of the Circuit Court is invoked by the plaintiff only on the grounds of diverse citizenship, a claim by the *defendant* of the repugnancy of a State law to the Constitution of the United States is not sufficient to give this court jurisdiction, upon writ of error, to review the final judgment of the Circuit Court sustaining such claim. Such an interpretation of the fifth section is not justified by its words. Our right of review by the express words of the statute extends to 'any case' of the kind specified in the fifth section. And the statute does not in terms exclude a case in which the Federal question therein was raised by the defendant. That section differs from Section 709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a State in this, that under the latter section we can review the final judgment of the State court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed *by him* under the Constitution or laws of the United States; whereas the Circuit Court of Appeals Act does not declare that the final judgment of a Circuit Court in a case in which there was a claim of the repugnancy of a State statute to the Constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is

made in the Circuit Court, no matter by which party, that a State enactment is invalid under the Constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.

"It was the purpose of Congress to give opportunity to an unsuccessful litigant to come to this court directly from the Circuit Court in every case in which a claim is made that a State law is in contravention of the Constitution of the United States."

And again, at page 485, it is said:

"The result is that this court has jurisdiction to review the judgment of the Circuit Court, and to determine every question properly arising in the case. We may, therefore, determine whether the court below erred in sustaining the demurrer to the petition."

The court then proceeds to consider the case upon all the question raised.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 544, it is said:

"Defendant in error insists that these cases should have gone to the Circuit Court of Appeals, and has moved on that ground that the writ of error be dismissed. The defense in each case was based in part on the Illinois Statute of 1893. The plaintiff insisted at the trial that the statute was in violation of the Constitution of the United States, and its position was sustained by the Circuit Court. There have been suits in which the Circuit Court upon the claim of the defendant has applied the Constitution of the United States to the case before it and put the plaintiff out of court. Here the

> plaintiff claimed that the State enactment upon which defendant relied was unconstitutional, and its position upon that point was sustained."

The court then quotes *Loeb* v. *Columbia Township Trustees*, 179 U. S., 477, above quoted, and concludes, "Upon the authority of that case the motion to dismiss is denied."

> "It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed we think it is apparent that it but asserts that, as the court below committed no error in deciding the Federal controversy, therefore there is no Federal question for review. *But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. Penn Mutual Life Insurance Company* v. *Austin* (1897), 168 U. S., 685. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case." *Andrews* v. *Andrews*, 188 U. S., 28 (1902).

THE ENTIRE MINING ACT OF ILLINOIS IS UNCONSTITUTIONAL AND NO RIGHT OF ACTION CAN BE BASED THEREON.

The principles applicable to the question whether, after the elimination of an unconstitutional provision of an Act, the remainder can be held enforceable, are well settled by the adjudications of this court as pointed out in *Connolly* v. *Union Sewer Pipe Company*, 184 U. S., at 565:

> "If different sections of a statute are inde-

> pendent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced, but if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the Legislature, then the entire statute must be held inoperative."

In that case, this court held that while the first section of the Act then under consideration embraced by its terms *all* persons, firms, corporations, or associations of persons who combine their capital, skill or acts for any of the purposes specified, the ninth section, which was held to be unconstitutional, declared that the statute should not apply to agriculturists or live stock dealers in respect of their products or stock in hand, and that to enforce the Act after eliminating the ninth section would result in reaching and fining agriculturists and live stock dealers, notwithstanding it was clear from the terms of the Act as enacted that the Legislature intended to exempt these two classes from its operation. It was, therefore, concluded that the Legislature would not have enacted this statute had it understood that agriculturists and live stock dealers were to be included in its operation, and the entire Act was therefore held to be unconstitutional.

In the case at bar, that part of Section 33 which prescribes the civil remedy for its violation, reads as follows: "For *any injury* to person or property occasioned by *any wilful violations of this Act* or wilful failure to comply with *any of its provisions,* a right of action shall accrue to the party injured for any direct damages sustained thereby." This provision has been construed by the Supreme Court of Illinois to read: "For any injury to person or

property occasioned by any wilful violations of this Act or wilful failure to comply with any of its provisions, a right of action *against the owner or operator of the mine* shall accrue to the party injured for any direct injuries sustained thereby." We contend that, thus interpreted, the provision in question is unconstitutional, for reasons already set forth in our original brief. But if that portion of the Act which purports to give a civil remedy for injuries resulting from the violation of those duties which are imposed by the Act upon the mine manager, examiner, and hoisting engineer, is unconstitutional, then there is no longer a valid section of the Act which gives such remedy for those violations, notwithstanding the clear intention of the Legislature, as expressed in the language above quoted, that a right of action should exist for an injury which resulted from *any* wilful violations of the Act or wilful failure to comply with *any of its provisions*. To continue the Act in force, therefore, for the purpose of allowing only actions against the owner on account of the violations of duties imposed only upon the owner, and to permit the scores of obligations imposed by the Act upon the mine officials and other employes to be violated without any right of civil remedy in behalf of the injured parties, is to continue in force a law which the Legislature of Illinois would never have enacted as an original piece of legislation. It is unnecessary to multiply authorities in support of the principles for which we are here contending, as the *Connolly* case above cited alone furnishes an analogy to the situation here disclosed which is sufficient in itself to dispose of this question.

THE FIRST COUNT IS BASED UPON DUTIES IMPOSED BY THE ACT UPON THE MINE OFFICIALS AS DISTINGUISHED FROM THE OWNER OR OPERATOR.

Section 19 of the Illinois Mining Act upon the first paragraph of which the first count of the declaration in this case is based, merely prescribes in greater detail than theretofore employed, the duties respecting ventilation previously imposed by the Act upon the mine manager and mine examiner. This is clearly shown by a reading of Sections 16 and 18 of the Act in connection with Section 19. This Section 16 provides in paragraph (b) "it shall be the duty of the *mine manager* to see that cross-cuts are made at proper distances apart to secure the best ventilation at the face of all working places," and this is further amplified in Section 19 in the paragraph marked "Cross-cuts (g)" which provides sixty feet apart as the maximum distance between cross-cuts; thus further defining what the Legislature considered as "proper distances." The same paragraph of Section 16 requires the mine manager to see "that all stoppings along air ways are properly and promptly built," and in Section 19 paragraph (h) headed "Stoppings" the Act defines what it means by "properly built" by prescribing that "the stoppings shall be built in a substantial manner with brick or other suitable building material, laid in mortar or cement, if practicable, but in no case shall they be built of lumber except for temporary purposes."

The same paragraph (b) of Section 16 further provides that the *mine manager* "shall keep careful

watch over all ventilating apparatus and the air currents in the mine," and the next paragraph (c) provides that "he shall measure or cause to be measured the air current with an anemometer at least once a week at the inlet and outlet, and shall keep a record of such measurements for the information of the inspector." Furthermore, the first paragraph (a) of Section 18 requires the *mine examiner* to see "that the air current is traveling in its proper course and in proper quantity." Thus, the whole responsibility of the *management and operation* of the ventilation in the mine as distinguished from the furnishing of the physical agencies for that purpose, is clearly and explicitly placed upon the mine manager and mine examiner, thus consistently adhering to the purpose of the Act already pointed out by us at page 31 of our original brief to make the mine owner or operator responsible for the location, physical equipment and external supervision of the mine and the mine manager, examiner and other mine officials responsible for its interior management. No modification of this purpose is shown by Section 19 which proceeds to deal in greater detail with the duties regarding ventilating currents and apparatus thus imposed upon the mine manager and examiner by Sections 16 and 18, above quoted. Thus the "proper quantity" of air referred to in Section 18 (a) is defined in Section 19 as "fresh air sufficient for the health and safety of all men and animals employed therein," and still more minutely in paragraph (a) as "not less than 100 cubic feet per minute for each person and not less than 600 cubic feet per minute for each animal in the mine";

the "proper course" of the air current is further enlarged upon in the same paragraph, Section 19 (a), by providing that "said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of every kind"; while the measurements of air currents which the mine manager must make with an anemometer in accordance with Section 16 (c) are further treated in Section 19 (b) and the provision added that "a record of such measurements shall be made and preserved in the office as *elsewhere provided for in this Act*"—referring, obviously, to Section 16 (c) where such record is required to be kept by the mine manager, for the information of the inspector.

The only provision of Section 19, which, it may be said in any way refers to a duty of the owner is the requirement that the ventilation in question shall be produced by a fan or some other artificial means, and no complaint is made of any neglect or insufficiency in that regard. On the contrary, the evidence clearly shows, without any contradiction, that a fan had been installed in the west entry, where the accident occurred, for a long time prior to the explosion, and served air therein to *twelve or fourteen men* daily, (Rec., 40, side page 59), while there were but two in the entry at the time of the explosion in question. There is no suggestion in Section 19 that the duties in relation to the maintenance of fresh air and the supervision of ventilating apparatus in the mine previously imposed by Sections 16 and 18 upon

the mine manager and mine examiner are in any respect diminished or transferred to the owner of the mine, but the entire removal of the owner's authority in connection with such matters is, if anything, made the more manifest by the insertion of the provisions that the *inspector* may increase the current of air in the mine above the specified amount at his discretion,—thus, by plain implication, forbidding the owner to regulate the air in his own mine.

It is further to be noted that this case was tried and submitted to the jury upon the theory that the duty relied upon in the first count of the declaration was that of the *mine manager*, as shown by the court's instruction to the jury already alluded to.

Respectfully submitted,

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
Attorneys for Plaintiff in Error.

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Reply for Plaintiff in Error.

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REPLY FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

In replying to the argument for defendant in error we shall adopt the same numerical headings which were used in that argument, taking up the questions in the order there discussed.

I.

THE MOTION TO DISMISS.

We have already replied under separate cover to defendant in error's motion to dismiss for want of jurisdiction and pointed out that this motion is based upon a misconception of that clause of Section 5 of the Court of Appeals Act of March 3, 1891,

which gives this court jurisdiction to review cases brought direct from the Circuit Court in which the "constitution or law of a state is claimed to be in contravention of the Constitution of the United States," whereby this court's jurisdiction is made to depend upon the existence of a *bona fide claim* of such contravention and not upon the *soundness* of plaintiff in error's views upon such constitutional question. The confusion of thought in which counsel have fallen upon this point is even more clearly demonstrated in the resume of their argument on this point, found at pages 23 and 24, where they say: "We therefore contend that if this first count is found by the court to be based upon Section 19 and that section is held to be not repugnant to the Constitution of the United States, as contended for by plaintiff in error, then, there being no substantial constitutional question involved in this dispute necessary to its determination, the writ of error should be dismissed and the judgment of the trial court affirmed." In other words, upon counsel's own statement of their position, this court must first pass upon the controverted question whether or not the first count is based upon Section 19 of the Mining Act and must next pass upon the further controverted question whether or not such section is repugnant to the Constitution of the United States (as it necessarily would be if the entire act is unconstitutional, as claimed by plaintiff in error), before it is in a position to pass upon the question of dismissing this writ of error. The answer to this position has already been given by this court in *Penn Ins. Co.* v. *Austin,* 168 U. S., at 695:

"The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the Constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument then in effect is that the right to a direct appeal to this court does not exist where it is claimed that a state law violates the Constitution of the United States, unless the claim be well founded. *But it cannot be decided whether the claim is meritorious and should be maintained without taking jurisdiction of the case.*"

II.

THE CONSTITUTIONALITY OF THE ILLINOIS MINING ACT.

Upon the first trial of this case it was taken from the jury under the following instruction from the court appearing in the record of the case in the Court of Appeals; "Gentlemen, the court holds on this motion to take the case from the jury that the plaintiff has failed to make out a case of willful negligence and cannot maintain this action, and you are instructed to find for the defendant." The Court of Appeals reversed the case (133 Fed., 193) upon the ground that there was evidence of willful negligence on the part of defendant which should have gone to the jury. In discussing the question which defendant raised in that court as an additional reason for affirming the judgment, that the Illinois Mining Act did not fix a liability upon the owner for the violations complained of in that case, and that to otherwise construe the act would be to render it unconstitutional, the court used the language quoted by counsel at pages 10-11 and 29 of

their brief. The error into which the court there fell and which has been adopted by counsel in their statement at page 29, "if the choice of the employer was limited *as in the Pilot Cases* to the *first* individual presenting himself for employment, etc.," was that of assuming that the Pilot Laws in question compelled the employment of the first pilot who hailed the vessel. As a matter of fact no such obligation was imposed by the New York Pilot Law of 1857, Chapter 243, which was before this court in *Homer Ramsdell Co.* v. *LaCompagnie, etc.,* 182 U. S. 406, and which is set out in full in a note on page 409 of that case. This same Pilot Act was before the New York Court of Appeals for construction in *Gillespie* v. *Zittlosen,* 60 N. Y., 449, involving the attempt of the first pilot who had hailed a certain incoming vessel to recover pilotage by reason of the fact that the master of the vessel had refused to take him and had taken another licensed pilot in his place. The court in an opinion by Chief Justice Church expressly held that there was no obligation upon the master to take the first pilot who offered himself, but that he could take any licensed pilot without being subject to the penalty imposed by the Pilot Act, and this opinion was reaffirmed by the court upon petition for rehearing. The case settled the meaning of the Pilot Act of 1857 upon this point, and that case was before this court in its consideration of the *Homer Ramsdell Co.* case and was referred to by this court at page 411 of its opinion, so that its ruling that the employment of a pilot under this New York statute was compulsory and relieved the master of the vessel from liability for negligence on the part of the pilot, must have involved

the proposition that such employment is compulsory even where there is a class of persons to choose from. As the majority opinion of the Court of Appeals quoted by counsel at page 29 of their argument was thus based upon a misconception of this Pilot Law, it is not entitled to the weight which would otherwise be accorded it.

Counsel further refer in support of their argument to the case of *Sherlock* v *Alling, Adm'r,* 93 U. S., 99. But as this case was also considered by this court in the *Homer Ramsdell Co.* case, *supra,* at page 416 of that opinion, and held to be inapplicable to the question of exemption from liability because of compulsory employment, which was then under discussion, we shall for the same reason disregard it.

The analogy between the position of the vessel master under this pilot statute and the mine owner under the Illinois Statute is evident. The mine owner is not required to employ the first manager, examiner or hoisting engineer who presents himself, but may choose from the limited number holding state certificates. He is, however, under penalty to employ one of each of these officials for the reason that it is impossible for him to operate his mine without them, and the Mining Act expressly makes it unlawful to employ any but a certificated official. But the Illinois Act goes further even than the Pilot Act for it not only requires that the mine official shall satisfactorily pass an examination upon specified subjects, and thus be generally competent to do his work, but also imposes upon him specific and positive duties in connection with the examination

and operation of the mine which find no counterpart in the Pilot Act. It is to be further remembered that it is not sought in this case to recover for mere negligence charged against the mine official, as was the case in the pilot suits, but for *willful violations* of specific duties defined in terms in the act and placed upon the mine officials. Upon every consideration, therefore, the claim of the mine owner for immunity in this case is far stronger than that of the shipmaster under the Pilot Laws. To make the analogy complete it will be necessary to assume a case in which the pilot statute in addition to its usual provisions directed, for example, every pilot who qualified under it, never to take his vessel within 500 feet of any sunken rock known by him to exist in a harbor and visiting penalties upon him for wilfully disobeying this direction. If, notwithstanding such prohibition, a pilot should wilfully steer the vessel within the prescribed area and personal injury should result, and the ship owner should then be held liable for such injuries, the exact injustice which results from the judgment in the case at bar would then be made to appear in the supposed case arising under the Pilot Law.

The citation from Huffcutt appearing at page 14 of counsel's brief is based upon the English case of *Martin* v. *Temperley,* 45 Eng. Com. Law Reports, 295. But in that case Justice Coleridge said, in finding in favor of the judgment against the master:

> "First, the men were selected by the defendant; secondly, they were paid by him; thirdly, they were doing his work, fourthly, *they were under his control,* that is were doing the work

> in the ordinary way. * * * The men here were as much under the defendant's control as a gentleman's coachman is under his master. The master cannot order the coachman to do an illegal act, as to drive furiously or on the wrong side, but subject to that the master has control over the coachman; so here the defendant had the control over the men navigating the barge subject to the rules of the river."

Under the Illinois Mining Act, on the contrary, the mine owner is absolutely deprived of the control over the mine officials, while the mine is in operation, as to those matters specifically placed under the direction of these officials by the statute, and it was for the violation of one or more of these specific duties that this suit was instituted.

Furthermore, the case of *Martin* v. *Temperley* is questioned in Sherman and Redfield on Negligence, 5th Ed., Vol. 1 at page 255 as inconsistent with the rule in *Quarman* v. *Burnett,* 6 N. & W., 499, which is generally recognized and followed. In that case Baron Parke said, page 509-510:

> "Upon the principle of *qui facit per alium facit per se* the master is responsible for the acts of his servant and that person is undoubtedly liable who stood in the relation of master to the wrongdoer,—he who had selected him as his servant from the knowledge of or belief in his skill and care and who could remove him for misconduct and *whose orders he was bound to receive and obey.* * * * *But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist."

We shall discuss this question somewhat further in connection with the question of vice principal raised by counsel.

In the case at bar no question arises of *incompetency* on the part of the mine officials guilty of the violations charged or of the retention by the owner of officials who were known to be incompetent, or with notice of whose incompetency the owner was chargeable. There is no suggestion in the record that up to the moment when Fulton was permitted to go into the gaseous west entry where he lost his life, either Wilson, the mine manager, or Pierrard, the mine examiner, had ever been guilty of a single act of disobedience or even indiscretion. On the contrary the evidence so far as it goes shows that these men had always performed their duties as required by law. It is no answer, therefore, to the charge that this was a compulsory employment to show, as counsel undertake to do by the *Seniger* case, 179 Ill., 370, that the defendant was under no obligation to retain Wilson or Pierrard in its employment, for no ground of discharge whatever appears in this case.

We add the following authorities to those already cited in support of our contention that the obligation upon the mine owner to employ certificated mine officials having prescribed duties, under penalty of fine and imprisonment, constitute compulsory employment and that to hold the mine owner liable, not for the *mere negligence* of these officials, but for their *wilful violation of positive duties imposed upon them,* is contrary to a principle of natural notice and hence violates any statute of which it forms a part.

It was held in *The China,* 7 Wall., 53, that the New York Pilot Act of 1857, the same one which

was under consideration in the *Homer Ramsdell Co.* case, a compulsory pilot was imposed. In support of this Mr. Justice Swayne refers to Dr. Lushington's opinion in *The Maria,* and uses the following language, p. 60:

> "Suppose the New York Statute, in the event of a refusal to take a pilot on board, instead of full pilotage had given the vessel or cargo to the pilot. Whether the amount to be paid were large or small, it would operate in the same way, and involve the same principle. The difference would be not in the fact but in *the degree* of compulsion. If it be said the master had the option to pay the pilotage, and proceed without the pilot, the answer is, that he would have had the same option if the consequence had been fine and imprisonment, or the visiting upon him of any other penal sanction. In each case there would be compulsion, measured in its force by the means prescribed to make it effectual. A duty is enjoined, and an obligation is imposed. The alternatives presented are to receive the pilot; or to refuse and take the consequences."

In deciding the case of *The Maria,* 1 Robinsons' Ad. Rep., at page 106, Dr. Lushington observes:

> "Now I am of opinion, that independently of the express provisions in those statutes, the compulsory taking of a pilot does *upon general principles* relieve the owner from all responsibility for his acts. Observe the expression of Mr. Justice LeBlanc," (one of the judges in *Carruthers* v. *Sidebottom*) "'Independent of the general principle, the Pilot Act provides,' etc. Although, therefore, his judgment was founded upon the opinion that the 55th section did apply to the Liverpool Act in the particular case he was deciding, he clearly recognized the general principle, and *this principle is one that is recognized by common sense and justice all*

over the world. Supposing, then, the General Pilot Act not to apply in this case, is not the general principle alone sufficient to exonerate the owners? I think it is, and for this reason: upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another, the principle upon which liability depends wholly fails."

"If the master is by statute compelled to take a pilot the owners are not responsible for his acts while the vessel is under his control. The reason for the distinction is this. The owner is responsible for the acts of the master and crew because they are his agents selected and appointed by him, and he is bound to provide persons of adequate skill, diligence, industry and sobriety for the proper management of the vessel. For the same reason he is responsible for the acts of any person to whom the master voluntarily entrusts the navigation of the ship but if the owner's authority is superseded by legislative authority and a person is put on board whose qualifications the owner does not decide upon, *but whose qualifications are determined by others* it is only conformable *to a principle of natural justice* to hold the owner exempted from responsibility for the acts of such person." Curtis on Maritime Law, 195-6.

We concede that it has for many years been the policy of the State of Illinois to safeguard the persons and lives of its miners, and that that policy is a most beneficent one, but we deny that it is right or desirable for the State of Illinois to safeguard one class of its citizens, viz., coal miners, by imposing unjust restrictions and obligations upon another class of its citizens, viz., coal mine owners. There is no force in counsel's argument that the

adoption of plaintiff in error's theory as to the unconstitutionality of the Illinois Mining Act will upset and nullify ~~this~~ quite beneficent policy of the state, for the reasons; first, if that policy is based on injustice towards certain members of the state community whereby other members are benefited at their expense, then the state policy ought to be done away with; and, secondly, that it is entirely possible to enact and carry into effect legislation having for its object the safeguarding of miners without creating any unjust restrictions or discriminations against other classes of citizens. We concede the great desirability of *some* legislation in behalf of those who are compelled to earn a livelihood by laboring in the coal mines of this state, but deny that the particular legislation now under consideration is a just or proper method of securing the desired result.

Counsel's view appears to be that one of the proper and beneficent purposes of legislation upon this subject is to furnish the injured miner with a claim against a financially responsible defendant, but we are unwilling to concede that the police power of the state under which this Mining Act was confessedly enacted, goes to that extent. So far as it provides examinations and prescribed duties which are reasonably designed to *prevent* injuries to mine operatives, it travels within the recognized limits of police legislation, and it seems clear that the placing of civil and criminal penalties and liabilities directly upon those officials in the mine whose violation of the specific duties imposed would result in injury to the miners, is a proper method

of insuring such *prevention* of injury by arousing these officials to a keener sense of duty. But, as we have already pointed out in our original brief, it does not tend to *prevent* such injuries to fix a civil liability for injury upon the owner of the mine, who can have no personal supervision over the miners' labors in the mine unless he actively officiates in all the positions of inspector, manager, examiner and hoisting engineer created by the statute, and this it is a practical impossibility for him to do by reason of the manifold and contemporaneous duties required of these officials as we have already shown.

In *Millett* v. *The People*, 117 Ill., 294, the court say, page 303:

> "Undoubtedly if these sections fall within police power they may be maintained on that ground; but it is quite obvious that they do not. Their requirements have no tendency to insure the personal safety of the miner or to protect his property or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety or the welfare of society. (Potter's Dwarris on Statutes, 458.) In *Austin* v. *Murray*, 16 Pick., 121, it was said: 'The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation.'" Citing further *Watertown* v. *Mayo*, 109 Mass., 315; *Matter of the application of Jacobs*, 98 N. Y., 109; *People* v. *Marx*, 99 N. Y., 377.

The court proceeds to point out that mining for coal is in no way affected with a public use so as to permit its regulation by law like a public warehouse, and says further, page 304:

"We are not unmindful that our constitution in Sec. 29, Art. IV, enjoins legislation in the interest of miners, but this is solely as respects their personal safety—the enactment of police regulations to promote that end."

"Generally it is for the legislature to determine what laws and regulations are needed to protect the public health and secure the public comfort and safety, and while its measures are calculated, intended, convenient and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act and see whether it really relates to and is convenient and appropriate to promote the public health. It matters not that the legislature may in the title to the act, or in its body, declare that it is intended for the improvement of the public health. Such a declaration does not conclude the courts, and they must yet determine the fact declared and enforce the supreme law."

Matter of Jacobs, 98 N. Y., 110.

III.

CONSTRUCTION OF THE MINING ACT BY THE SUPREME COURT OF ILLINOIS.

Under this heading counsel argue, and are supported in their arguments by statements of the Supreme Court of Illinois, that under the Illinois Mining Act the mine manager, examiner and hoisting

engineer are *vice principals* of the owner, and repeated reference is made to the fact that the mine owner should not be permitted to *delegate to these mine officials* the statutory duties imposed by the act. This whole argument, and we submit that of the Illinois court upon which it rests, is based upon a total misconception of the true relationship which constitutes one man the vice principal of another. If, as we have already contended, this Mining Act means what it plainly says, and imposes upon the mine officials and upon no one else the duties whose violation are complained of in this action, then it is impossible to conceive of these duties as being delegated to the mine officials by the mine owner, for, plainly the mine owner never was burdened with them, and it is therefore impossible to put in force as against this defendant the doctrine of *respondeat superior* upon which alone defendant's liability can be made to rest.

In Sherman & Redfield on Negligence, 5th Ed., Vol. 1, Sec. 231, the New York law on the subject of vice principal as established in *Crispin* v. *Babbit*, 81 N. Y., 516, is referred to, and it is further said:

> "Under this rule a vice principal is one to whom is deputed the discharge of some duty or the exercise of some power *which belongs to the master as such*, and he does not act as a vice principal when engaged in any work which does not pertain to the duty or peculiar powers of the master; just as an agent does not act as an agent when doing some act entirely outside of his agency but who may be at the same moment a vice principal as to one duty and a fellow-servant as to another."
>
> "There must then be some principal which limits and defines the rule, *respondeat superior*.

And we think it may be clearly seen and stated. It is this: *the responsibility of a master grows out of, is measured by and begins and ends with, his control of the servant* * * * The master is responsible for what is done by one who is his servant in fact, for the reason that he has such servant under his constant control and may direct him from time to time as he sees fit and therefore the acts of the servant are the acts of the master, because the servant is at all times only an instrument, and *is not liable for a person who is a servant only by construction, excepting so far as this essential element of control and direction exists between them.*"

1 Parsons on Contracts, Fourth Edition, *pages 102-4.

"In every case the position of vice-principal must be determined by ascertaining whether the act performed or duty omitted is one the doing of which *is charged upon the master and delegated to the servant.* In other words, whether the servant has been put in the place of the master as to the particular service performed or omitted."

The New Pittsburg Coal & Coke Co. v. *Peterson,* 136 Ind., at 403.

"The controlling consideration in determining whether an employe is a vice-principal is not his comparative rank, not his authority to command, and not his authority to employ and discharge, but whether he is the representative of the master in respect to those duties which the master cannot escape by a delegation of them." Citing numerous authorities.

Southern Ind. R. R. Co. v. *Harrell,* 161 Ind., at 695.

"The duty of the operator or agent is to employ a competent mine boss according to the

provisions of the statute, and when he has done so he has discharged his duties to his employes in relation to those duties which the statute prescribes shall be performed by such mine boss, and the operator or agent is not liable for injuries arising from negligence of the mine boss, *who is not a vice-principal, as his duties are not delegated to him by his employer, but are prescribed by statute.*"

Williams v. *Thacker Coal & Coke Co.*, 40 L. R. A., 812.

"One who has not the authority of a general vice principal may be intrusted by the master with the discharge of absolute personal duties that rest upon it, such as the duty to use reasonable care to employ competent and careful fellow-servants, and in such a case he may be termed a special vice-principal. He stands in the place of the master when he is discharging one of these personal duties of the master, and the latter is liable for his negligence in the discharge of it; but in the performance of his other services as a general employe he is not the representative of the master, nor is the master liable for his negligence in the performance of them. Whether or not the master is liable for the negligence of such a servant in a given case must be determined by the nature of the duty in the performance of which he was guilty of the negligence. If he was engaged in discharging an absolute duty of the master, the latter is liable; otherwise it is not. *Railroad Co.* v. *Baugh*, 13 Sup. Ct. Rep., 914, 919, 921; *Coal Co.* v. *Johnson*, 56 Fed. Rep., 810; *Brown* v. *Winona & St. P. R. Co.*, 27 Minn., 162, 165, 166, 6 N. W. Rep., 484; *Brown* v. *Minneapolis & St. L. Ry. Co.*, 31 Minn., 553, 18 N. W. Rep., 834."

City of Minneapolis v. *Lundin*, 58 Fed. Rep., at 527.

We agree with counsel that the construction by the highest court of the state of a statute of that state is as conclusive and binding as the text of the law. But it does not follow that the decision of that court upon the question whether the statute contravenes the Constitution of the United States is binding upon the United States Supreme Court. We also agree with counsel in their view as to the meaning of the word "willful" under the Illinois statute, and we have invoked that meaning in our original brief in discussing the action of Fulton in entering the gaseous west entry of the mine in which he met his death.

In view of the evidence quoted by counsel at page 31 of their argument, and other testimony, it may have been entirely proper to find the mine manager, Wilson, and the mine examiner, Pierard, guilty of willful violation of the statute, but it is only by resort to a doctrine of *imputed willfulness* that the mine owner can be charged with such disobedience. The mine was equipped in all respects as required by law, the mine officials had been selected from those designated by the act, and no charge of previous misconduct which could put the owner on notice of possible future misbehavior is made in this case. The action of these officials which caused the accident, according to plaintiff's contention, could not have even been anticipated, much less known, by the owner, so as to have prevented it, and the owner was powerless in the premises, at the best. To hold the owner guilty of a *willful* act or omission of any description in this case is to pervert the meaning of that term.

IV.

PROXIMATE CAUSE.

Under this heading counsel say, at page 32, in reference to Wilson's command to Fulton to enter the west roadway:

> "We cannot see how this act of Wilson's standing alone could have caused Fulton's death. It is only when taken in connection with his failure to clear the mine from gas, that the order of Wilson has any bearing on the case."

This quotation indicates that counsel have misapprehended our argument, as we have never claimed that Wilson's action, by itself, could have caused Fulton's death. The question of proximate cause could not arise under such circumstances, for it is only in connection with other acts, usually negligent, that reference is had to the doctrine of proximate cause.

Counsel's answer to our argument under Section II of our original brief appears to be that the real proximate cause of this accident was defendant's negligence in permitting gas to accumulate in the mine, and not the act of Wilson in ordering Fulton into the mine. That, however, was a question *for the jury,* as the trial court recognized in instructing the jury (Rec., 97), that if they believed Wilson's order to have been the proximate cause of Fulton's death, then the plaintiff could not recover. Our whole complaint upon this point is that the question was not properly submitted to the jury by reason of the erroneous definition of proximate cause subsequently announced by the court. Had the court in-

structed the jury properly upon this point, it might have found, in accordance with counsel's contention, that the gaseous condition of the mine, and not Wilson's order, was the proximate cause of death. But the question now under consideration is not *what was, in fact, the proximate cause of Fulton's death,* but *whether or not the jury was so instructed as to the meaning of proximate cause that they could intelligently decide that question upon the evidence before them.*

We submit upon our former argument that error was committed in this matter by the trial court, and that such error was prejudicial. Upon the prejudicial nature of this and other error appearing in this record, see *Inman Bros.* v. *Dudley & Daniels Lumber Co.,* 146 Fed. Rep., at 452 (advance sheets):

> "The defense now made for this ruling is not that the court did not misconstrue the contract and commit error in excluding evidence of actual cut of mill, but that the error was harmless, and therefore not ground for reversal. *That error is always presumed to be prejudicial is elementary.* Nevertheless, it is an established rule in error proceedings that error which is not prejudicial will not justify a reversal. But in *Deery* v. *Cray,* 5 Wall., 796, 807, 18 L. Ed., 653, the court said that 'when the application of this rule is sought it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights.' This language has more than once been repeated in subsequent cases (*Vicksburg, etc., R. R.* v. *O'Brien,* 119 U. S., 99, 7 Sup. Ct., 118, 30 L. Ed., 299), and was applied by this court in *Standard Life Insurance Co.* v. *Sale,* 121 Fed., 666, 57 C. C. A., 418."

V.

CONTRIBUTORY NEGLIGENCE.

We concede for the purposes of this argument that ordinary contributory negligence would not be a defense to this action under the construction placed upon the Mining Act by the Illinois Supreme Court, and we have not contended otherwise. We endeavored upon our original argument under Section IV to plainly point out the contention which we do make upon this point, viz.: that *willful* conduct on the part of plaintiff or actions which were taken in *reckless disregard of consequences,* in view of known surroundings, and which contributed to plaintiff's death, should be a defense to *willful* conduct on the part of the defendant. This question has never been passed upon, so far as we are advised, by the Illinois Supreme Court, and is open to decision in this case, being squarely presented by evidence of conduct on the part of the plaintiff's decedent which, under the definition of willfulness invoked by counsel for defendant in error, is quite as willful as any act charged against the defendant.

VI.

THE COURT'S REFUSAL TO GIVE DEFENDANT'S REQUESTED INSTRUCTION (Rec., 107) BASED UPON SECTIONS 31 AND 33 OF THE STATUTE.

We confess to an inability to see the pertinency of counsel's reply to our contention upon this point. We do not understand that it is necessary for the

court in giving instructions in a case predicated solely upon a state statute to refer to that statute in each of its instructions. However, this instruction begins with the words, "You are instructed that *under the laws of this state in force at the time of Samuel Fulton's death,* it was unlawful, etc." It is further said that the instruction fails to describe the particular character of willful act referred to, but the instruction was as explicit as the statute itself upon this point, and quite as explicit as the circumstances of the case called for. There was evidence in the record setting forth fully and minutely the circumstances under which Fulton entered the west entry, and it was for the jury to decide whether that evidence showed conduct on Fulton's part which amounted to a willful act which endangered the lives or health of persons or property in the mine.

VII.

ONE GOOD COUNT NOT SUFFICIENT TO SUSTAIN THIS JUDGMENT.

Counsel seek to divert attention from the seven counts which admittedly involved the troublesome constitutional question in this case, and to fix the court's attention upon the first count as being one free from criticism and sufficient in itself to carry this case through to an affirmation of judgment, irrespective of errors that may have been committed in connection with the other counts. It is, however, an undeniable fact that many separate issues are involved in this case, as many, at least, as the number of counts upon which the action proceeded. It

is also an undeniable fact that the verdict was a general one. It is impossible, therefore, to tell upon which of the issues tendered the jury reached its verdict. Under such circumstances it is famiilar law that if upon any one issue error was committed, the verdict cannot be upheld.

> "On the trial evidence was introduced bearing upon the issues and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given."
>
> *Maryland* v. *Baldwin*, 112 U. S., at 493.

> "The risk of this act of negligence is one of the risks which the plaintiff voluntarily assumed when he entered upon his employment, and as the court erroneously instructed the jury that the defendant was liable for this act, if it was negligent act, and if Ford was a vice-principal, we cannot say that the verdict was not affected by this error. The verdict was general and its generality prevents us from discovering upon which of these acts of negligence charged it was founded. A general verdict cannot be upheld where there are several issues tried and upon any one of them error is committed in the admission or rejection of evidence or in the charge of the court, because it may be that the jury founded their verdict upon the very issue to which the erroneous ruling related, and that they were controlled in their finding by that ruling. *State of Maryland* v. *Baldwin*, 112 U. S., 490."
>
> *What Cheer Coal Co.* v. *Johnson*, 56 Fed. Rep., at 813.

Defendant requested an instruction as to each of the last seven counts, as well as to the first, that no recovery could be had thereunder, for the reason that it was based upon a statute which was contrary to the Constitution of the United States. (Rec., 105, 106.) It further requested instructions as to the second and third counts that no recovery could be had thereunder, it appearing without contradiction in the evidence that the mine in question was a "long-wall" mine in which crosscuts and stoppings were wholly unknown, and could not, therefore, have been contemplated by the Act; as to the fifth count, that no recovery could be had thereunder, for the reason that under a proper construction of Section 18 (b) of the Act, plaintiff's intestate entered the mine to work therein under the direction of the mine manager, and also that if the jury believed from the evidence that the defendant Fulton just before the time of his death entered the mine to work therein under the direction of the mine manager, Wilson, then the jury should find the defendant not guilty; and as to the sixth count, that under a proper construction of Section 16 (b), it had no application to the defective machinery shown in evidence in the case. (Rec., 102, 103, 107.) Defendant further moved to strike out each of these last named counts upon the grounds above stated. (Rec., 61.) Defendant further requested instructions that plaintiff's intestate could not recover if he was engaged at the time of his death in a willful act which endangered the lives or health of persons working in the mine or the security of the mine or its machinery, if such willful act contributed to his death, and that

he could not recover if his death resulted in part from his reckless disregard of consequences in view of his surroundings, etc. (Rec., 107.) All of these requested instructions and motions raised questions of law applicable to the several issues tendered by the last seven counts, and all of them were refused by the court. Likewise the court's instruction that plaintiff could recover against the defendant if the mine manager or the mine examiner were found to have willfully violated any provision of the Mining Act declared on in any count in the declaration (Assignts. of Error, 8, 9 and 10; Rec., 112, 113) raised a question of law applicable to each of these issues. If, therefore, we assume, for the sake of the argument, that plaintiff's contention is sound, that the first count is unassailable on constitutional or other grounds, we still have the exact situation referred to by the foregoing authorities, viz.: a general verdict returned upon several issues with the impossibility of determining upon which one or more of the issues the jury found for the plaintiff; and if, therefore, the court erred as to any one of the instructions or motions so requested and refused, or as to the instructions so given, this judgment must be reversed, irrespective of the merits of the first count, as it may be that such erroneous act on the part of the court caused the jury to make the finding which it returned.

Respectfully submitted.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
Attorneys for Plaintiff in Error.

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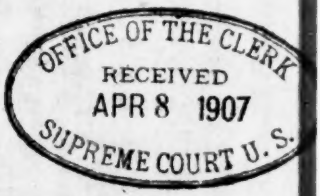

No. **139.**

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D., 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,
vs.
MINNIE FULTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

Petition for Rehearing by Plaintiff in Error.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
ATTORNEYS FOR PLAINTIFF IN ERROR.

BARNARD & MILLER, PRINTERS, CHICAGO.

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MAY IT PLEASE THE COURT:

Upon the retrial of this case ordered by this court the question of the proximate cause of Fulton's death will be again presented to the trial court and jury for consideration. The Supreme Court of Illinois has expressly held in *Odin Coal Co.* v. *Denman*, 185 Ill., at page 418 that

> "it is not sufficient to maintain an action of this character (*i. e.*, under the Mining Act) to establish merely a willful omission of statutory duty. It is necessary the injury complained of shall have resulted from the omission—*that the omission was the proximate cause of the injury.*"

In other words, the same rule as to proximate cause applies in this case, under the authoritative

construction of the act by the Illinois Supreme Court, as applies to other cases at law, viz.,

> "that no negligence or other wrong of any kind whatsoever can furnish the foundation of an action for damages unless it was the proximate cause of the injury suffered by the plaintiff, the maxim of the law being *causa proxima, non remota, spectatur.*" (1 Thompson Comm. on Negligence, Sec. 44),

and defendant will avail itself of this, as of all other defenses, open to it.

In asserting this defense upon the new trial defendant will, we conceive, be seriously handicapped by the opinion of this court bearing upon that subject, insofar as that opinion holds, in effect, that the defendant was guilty of concurrent negligence and that therefore there was no room for the application of the doctrine of proximate cause. We submit that under the evidence in this case, the questions whether defendant was guilty of negligence, concurrent or otherwise, and whether such negligence, even if concurrent, was the proximate cause of the injury, were for the jury to decide, and should have been submitted under instructions so clear and unambiguous as to be incapable of misleading the jury, and we respectfully petition the court to modify its opinion to meet the views hereinafter expressed upon that subject. The subject of concurrent negligence was nowhere raised or discussed upon the trial or in the arguments submitted in the case, but was first introduced in the opinion of the court.

It is necessary to a clear understanding of our present contention to recall the following evidence

introduced upon the trial of this case: 1st, That Fulton was an experienced coal miner, thirty-six years of age, and had worked in the defendant's mines for seventeen years (Rec., 49, 62); 2nd, That he had been working in the mine where he met his death for from two to three months before the accident (Rec., 62) and had laid all the tracks that had been laid in the mine including that in the west entry (Rec., 40, 62) and *had brushed gas out of it* (Rec., 83); 3rd, That there was always gas in the west entry from the time it was opened until the time of the accident (Rec., 40, 64) and that a fan had been installed in this roadway some two months previously for the purpose of overcoming this difficulty (*Ibid*); 4th, That Fulton was with Wilson on the previous afternoon, when the latter had stopped the fan in the mine, after the men quit work (Rec., 65) and on the morning in question had helped to start the fan, a few moments before the accident occurred (Rec., 35, 65, 83) and therefore knew that the gas had been accumulating in the west roadway over night; 5th, That a fellow miner, named Callegaro, had been injured by an explosion of gas in this very roadway within twenty yards of the entrance, during the preceding month to Fulton's knowledge (Rec., 76-7); 6th, That it took about twenty minutes for the fan after it was started to clear the gas out of the west roadway (Rec., 69); 7th, That just before the alleged order was given to Fulton by Wilson he was seen seated upon his car at the foot of the shaft with his arms folded (Rec., 36, 43).

Here was evidence sufficient to justify a finding by the jury that Fulton, an intelligent, rational be-

ing, with knowledge of the danger involved in entering a gaseous roadway with an open light upon his cap, would not, but for Wilson's order, have entered the roadway until it had been made safe through the operation of the fan, *and that he was in fact waiting at the entrance of the roadway with his car for this very thing to take place when the order was given.* Had the jury so found, as it was possible for them to do, they then must further have found that the dangerous condition existing by reason of the accumulation of gas in the west roadway was in process of removal through the means provided by defendant and in the ordinary course of events, so far as they could be reasonably foreseen, the gas would have been dispersed within a few moments so as to be entirely harmless to the occupants of the mine, and that the immediate and proximate cause of the accident was the intervention of an independent, outside force, in no way connected with the gaseous condition in question, nor reasonably to be foreseen by defendant nor chargeable to it under the Act, *i. e.*, an order from the mine manager, Wilson, to proceed at once into the roadway. We do not say that this *must* have been the finding of the jury. It is sufficient for our present contention that it *might* have been; and if this is true, then the question of the proximate cause of Fulton's death should have been submitted to the jury under clear and unambiguous instructions, and this was especially true in view of the importance of the issue and the conflict in the evidence, under the rule hereinafter pointed out. That this was not done appears, as clearly as it can be expressed, by a reading of the following language of the charge:

> "Now by proximate cause is meant efficient cause. *In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death?*"

We submit that the true rule is that laid down in 21 A. & E. Enc. of Law, 2nd Ed., p. 485:

> "A proximate cause in the law of negligence, is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred,"

and that this rule has been consistently recognized and applied by the federal courts to relieve defendants from liability even though such defendants were themselves guilty of negligence but for which the injury would not have resulted.

In *Railroad Co.* v. *Reeves*, 10 Wall., 176, there was evidence that the defendant had agreed to ship the goods in question by a night train that would have removed them from Chattanooga before the appearance of a destructive freshet, but failed to do so, and the goods were injured by the freshet. The court instructed the jury that if, while the cars were standing at Chattanooga they were submerged by a freshet that no human care, skill and prudence could have avoided, then the defendant would not be liable; but if the cars *were brought within the influence of the freshet by the act of the defendant*, and, *if the defendant or its agent had not so acted, the loss would not have occurred*, then it was not the act of God and defendant would be liable. Mr. Justice MILLER in rendering the opinion of the court said (p. 190):

> "In contrast with the stringent ruling here stated, and as expressive of our view of the law

on this point, we cite two decisions by courts of the first respectability in this country.

"In *Morrison* v. *Davis & Co.* (20 Pa. St., 171), goods being transported on a canal were injured by the wrecking of the boat, caused by an extraordinary flood. It was shown that a lame horse used by defendants delayed the boat, which would otherwise have passed the place where the accident occurred in time to avoid the injury. The court held that the proximate cause of the disaster was the flood, and the delay causd by the lame horse the remote cause, and that the maxim, *causa proxima, non remota spectatur,* applied as well to contracts of common carriers as to others. The court further held, that when carriers discover themselves in peril by inevitable accident, the law requires of them ordinary care, skill, and foresight, which it defines to be the common prudence which men of business and families usually exhibit in matters that are interesting to them.

"In *Denny* v. *New York Central Railway Co.* (13 Gray, 481), the defendants *were guilty of a negligent delay of six days* in transporting wool from Suspension Bridge to Albany, and while in their depot at the latter place a few days after, it was submerged by a sudden and violent flood in the Hudson River. The court says that the flood was the proximate cause of the injury, and the delay in transportation the remote one; that the doctrine we have just stated governs the liabilities of common carriers as it does other occupations and pursuits, and it cites with approval the case of *Morrison* v. *Davis & Co.*

"Of the soundness of this principle we are entirely convinced, and it is at variance with the general groundwork of the court's charge in this case."

In the *Reeves* case thus decided by this court, as well as in the Pennsylvania and Massachusetts cases cited in the opinion, the defendant's negligent delay

contributed to the injury to the extent that it could properly be said that but for such negligence the injury would not have happened, just as in the case at bar it could be said that but for the accumulation of gas the death of Fulton would not have happened; yet this court refused to recognize such acts as the proximate causes of the injuries complained of, and for that reason held the defendants not liable. In this case the permitting of the gas to accumulate was no more a concurrent act of negligence than the delaying of the goods was such an act in the cases just cited. In all these instances the defendants had, by their prior negligent inaction, permitted conditions to arise which, under the operation of an independent and unforseen force, over which they had no control and with which they were not chargeable, resulted in injury to the plaintiffs, and the same ruling should apply to each.

This principle is even more strongly brought out in *Goodlander Mill Co.* v. *Standard Oil Co.*, 63 Fed. Rep., 400, where it was in evidence that the defendant had negligently shipped a carload of crude petroleum in a car which had no valve regulating the outflow of oil, and it was upon this negligence that the palintiff predicated its action. Plaintiff, the consignee, had the car removed to a sidetrack, and then, with knowledge that the car was leaking, attempted to draw off the oil near plaintiff's mill, and owing to the absence of the valve the oil ran out so rapidly that it flowed into plaintiff's engine room, exploded and destroyed the mill. The court, Judges Woods, Jenkins and Bunn, held that defendant was not liable, since its negligence was not the proximate cause of the injury. It said (page 405):

> "The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred."

The cases of *R. R. Co.* v. *Kellogg*, 94 U. S., 469, and *Ins. Co.* v. *Boon*, 95 U. S., 130, are then cited, and the court continues:

> "The negligent omission of the valve did not necessarily set the other causes in operation. It was, in the language of the *Boon* case, above referred to, *the incidental cause, or the instrument of a superior and controlling agency*, and was therefore not the proximate and responsible one. If the owner of a magazine in which gunpowder is stored should carelessly leave open its door, and a responsible human being should enter with a lighted candle, knowing of the presence of the gunpowder, and an explosion should ensue, could it be affirmed that in any legal sense the careless act of leaving open the door was the cause of the explosion?"

It would be difficult to suggest an illustration more closely in point upon the present inquiry than that here put forth by Judge Jenkins, or to find a case so exactly similar in principle as the one thus decided by the Circuit Court of Appeals.

The case of *Milwaukee Railway Co.* v. *Kellogg*, 94 U. S., 469, referred to in the decision last cited, sets forth the general principles and is a leading case upon this subject. This court, speaking through Mr. Justice STRONG, says (p. 474):

> "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact at-

tending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, *or was there some new and independent cause intervening between the wrong and the injury?*"

In *Insurance Co.* v. *Boon*, 95 U. S., at 130, this court, again speaking through Mr. Justice STRONG, said:

> "The proximate cause is the efficient cause, *the one that necessarily sets the other causes in operation.* The causes that are merely incidental or instruments of a superior or controlling agency, are not the proximate causes and the responsible ones, though they may be nearer in time to the result."

And again at page 133:

> "The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss." Citing the *Kellogg* case, *supra.*

In the case at bar the gas in the west roadway was harmless to one outside the roadway, at the foot of the shaft, and was, at the time of the accident, being rapidly dissipated under the operation of the fan, and there is not a syllable of testimony or other evidence tending to prove that Fulton would have entered this roadway prior to its clear-

ance from gas had not he been directed so to do by Wilson, while there is evidence, already pointed out, tending to show affirmatively that it was his intention to wait for the roadway to be cleared. Under these circumstances, the gas was, as was said in the *Boon* case, *supra,* merely the instrument of a superior or controlling agency, *i. e.,* the unforeseen and unanticipatable act of Wilson.

In *St. Louis Ry.* v. *Commercial Ins. Co.,* 139 U. S., 223, the defendant was under contract to transport all cotton brought to a certain compress, which agreement it broke by neglecting to furnish transportation. Shortly thereafter a fire occurred which burned up the cotton which the defendant ought to have transported (p. 236). In holding the defendant not liable for the loss, the court say (p. 237):

> "The delay of the defendant railway company to furnish transportation according to its contract with the compress company was in no legal sense a cause of the destruction of the property. It was simply one of a series of antecedent events *without which the loss could not have happened,* for if the cotton had not been there it would not have been burned. The cause of the loss was the fire, kindled by some unknown means, *and in no way arising from or connected with the neglect of the defendant to furnish transportation.* Upon principle and authority that neglect was not the direct and proximate cause of the loss by fire and did not make the defendant responsible for that loss to the owners of the cotton or to their insurers." Citing the *Reeves* and other cases.

In *Lewis* v. *Flint, etc., Ry. Co.,* 54 Mich., 55, the defendant wrongfully carried plaintiff past his station, and in wandering about in search of a pathway plaintiff fell into a cattle guard and was in-

jured. The opinion of the court by Judge Cooley reviews a long list of cases and finds the defendant not liable, as the negligence of defendant was not the proximate cause of the injury, although, obviously, but for such negligent act the injury would not have happened.

It is no answer to our contention that this case should have been submitted to the jury under a proper instruction as to proximate cause to say that the defendant was guilty of concurrent negligence, for even if such were the case, the doctrine of proximate cause still obtains.

In *Union Pacific Railway Co.* v. *Callahan,* 56 Fed., 988, heard in the Circuit Court of Appeals before Judges Sanborn, Shiras and Thayer, Judge SANBORN says, speaking for the court, at page 990:

> "It is also well settled that a master is liable for an injury to a servant which is caused by his own negligence and the concurrent negligence of a fellow-servant (citing cases.) *But in every case the negligence of the master must be the proximate cause of the injury,* and the burden is on the plaintiff to prove such acts of carelessness on his part as constitute the immediate cause of the accident. No act contributes to an injury in the legal acceptance of that term, unless it is a proximate cause of that injury—unless it is near to it in order of causation. *Jacobus* v. *Railway Co.,* 20 Minn., 125."

To the same effect is *Little Rock, etc., R. R. Co.* v. *Barry,* 84 Fed. R., 944, before Judges Sanborn, Thayer and Phillips in the Circuit Court of Appeals, where it was held that even if it were negligence on the part of the defendant not to notify plaintiff, who was the engineer of an extra passenger train, of the position of a freight train with which his train

had collided, or not to notify the freight train employes of the approach of the extra passenger train, still the proximate cause of the injury was the negligence of plaintiff's co-employes in charge of the freight train, and no recovery could be had of the defendant. Judge Thayer's dissent, so far as it relates to this subject, was merely to the point that the question of proximate cause was one for the jury, which is our contention in the present instance.

We submit, furthermore, that Wilson's order and the gaseous condition of the west roadway were not acts of concurrent negligence within the doctrine of the *Hickey* case, 166 U. S., 521, cited by this court in its opinion, in which the act of the street car in crossing the railroad tracks and the act of the Railroad Company's gatekeeper in lowering the gates originated and were carried into execution contemporaneously, and practically constituted one act, as this court held. In the case at bar the accumulation of gas was not an act of the defendant's at all, but was a condition which the defendant had permitted to arise and which had been entirely completed some time prior to the order from Wilson, just as the failure of the railroad companies in the *Reeves, Morrison, Denny,* and *Commercial Ins. Co.* cases, *supra,* to diligently transport the freight created conditions prior to the flood and fire upon which the latter operated to cause the loss. We again refer the court to the facts in the *Goodlander Mill Co.* case, 63 Fed. R., 400, *supra,* and to the illustration of the powder magazine there used, as illustrations of the negligence, if any, of which this defendant was guilty. In any event it

was for the jury to decide, under proper instructions, just what causal relation the accumulation of gas bore to the injury, in view of the positive evidence that this gaseous condition was being rapidly eliminated, and in itself was harmless, so far as Fulton was concerned, up to the time of Wilson's order. This order, by the way, was one for which no recovery could be had not only because not counted upon in the declaration, but also because not forbidden by the Mining Act, and therefore not available as the basis of a statutory action of any character.

If we are correct in our contention that this question of proximate cause was one for submission to the jury, then the law is clear that the court's contradictory and misleading instruction constituted prejudicial error, in view of the conceded conflict of testimony in this case.

> "It is a familiar rule in this court that where there is contrariety of evidence, and where the case has been fairly presented to the jury, on proper instructions, the verdict will not be disturbed unless it is manifestly against the weight of the evidence, or where it appears clearly to have been the result of passion and prejudice; but in that class of cases sounding purely in damages, where the evidence is conflicting, and presents a difficult issue even to persons accustomed to investigate legal matters, the jury ought to be most accurately instructed. We know, from common observation, how apt they are, in cases where the recital of the facts tend to touch their feelings, to seek for a reason that would justify them in finding a verdict in accordance with their sympathies. An improper instruction may often afford the desired pretext, and in all such cases no instruction which is calculated to mislead the

jury into giving a verdict not warranted by law should be allowed to go to them."

C., B. & Q. R. R. Co. v. *Van Patten,* 64 Ill., 513.

In *T. W. & W. Ry. Co.* v. *Moore,* 77 Ill., 217, the court say at page 222:

> "If this was a case in its facts where the evidence largely preponderated in favor of appellee we might decline to reverse on the ground that the instruction, although erroneous, did not mislead the jury, but the evidence of the parties is so evenly balanced that justice and the rights of the parties demand that the law should be given accurately to the jury."

In that case, as the court points out at page 219, there was a clear conflict of testimony upon a vital question in the case, viz., as to the sufficiency and safety of the boiler at the time it exploded.

In *Volk* v. *Roche,* 70 Ill., at pages 298-299, it is said:

> "The evidence was conflicting and appellants insist that the instructions were erroneous and misled the jury. Where there is a conflict of evidence or where it leaves it doubtful which way the jury should find, it is important that the instructions should be *not only accurate but clear and perspicuous.*"

The same language is repeated in *Cushman* v. *Cogswell,* 86 Ill., at p. 66.

> "When, however, the evidence is so evenly balanced that the jury might be justified in finding either way, it is highly important that their deliberations should not be influenced by any improper instruction."

Shaw v. *The People,* 81 Ill., 151.

We have been served with a petition for rehearing on behalf of defendant in error in this case, and find no rule of the court relating to a reply to such petition by plaintiff in error. The subject treated by defendant in error has been already fully covered in the opinion of the court, which dealt with the authorities cited by defendant in error in her original brief, except, perhaps, as to one point not there mentioned, viz., that defendant's motion to strike out the sixth count of the declaration (Rec., 61) upon the ground that the alleged defect in the mining machinery, of which evidence had been given, was not such a defect as was contemplated by the statute, and defendant's requested instruction that no recovery could be had under this count (Rec., 103) raised questions of law, purely, as to the proper construction of the Mining Act, which the trial court improperly decided against defendant, to its prejudice before the jury. If the rule of this court is not to consider a reply upon a motion for rehearing, the foregoing suggestion can, of course, be disregarded.

Respectfully submitted.

CHARLES S. HOLT,
ARTHUR D. WHEELER,
WILLIAM P. SIDLEY,
Attorneys for Plaintiff in Error.

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No. 139

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

WILMINGTON STAR MINING COMPANY, *Plaintiff in Error,* *vs.* **MINNIE FULTON,** *Defendant in Error.*	In Error to the Circuit Court of the United States for the Northern District of Illinois.

MOTION TO DISMISS APPEAL AND AFFIRM JUDGMENT.

ARTHUR J. EDDY,
P. C. HALEY,
E. C. WETTEN,
Attorneys for Defendant in Error.

THE GUNTHORP-WARREN PRINTING CO., 116 RANDOLPH STREET, CHICAGO.

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MAY IT PLEASE THE COURT:

We respectfully present for the consideration of the court in this case the following motion:

Now comes Minnie Fulton, defendant in error in the above entitled cause, by Arthur J. Eddy, her attorney, and moves the court to dismiss the writ of error herein and to affirm the judgment of the Circuit Court rendered herein.

STATEMENT OF PROPOSITION.

The constitutional point raised by counsel for plaintiff in error, upon which the right of appeal to this court is based is this: that the Miners Law of Illinois (Chap. 93, Rev. Stat. of Illinois)—under which this action is brought—is in contravention of that portion of the Fourteenth Amendment of the Constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction equal protection of the laws.

The complaint made by plaintiff in error is, that the act compels mine owners to employ in their mines a mine manager, hoisting engineer and a mine examiner, who are required by law to pass an examination and procure a certificate before being qualified to take such positions, and also requires that these employes shall perform certain specified and enumerated duties, and further provides that a right of action shall accrue to any one suffering injury to person or property, or to the widow and those dependent upon any person who may be killed by reason of a willful violation of the provisions of the said Act.

Plaintiff in error contends that the choice of the employer is thus restricted to a certain class of men, and the control of the aforesaid employes is partially taken from the employer by reason of the statutory duties imposed on them, and that to hold the employer

liable for a violation of the statute by such servants is unconstitutional and therefore it is contended that the act, in so far as it attempts to create such liability, is void.

Our answer to that contention—for the purpose of this motion—is this: the declaration consists of eight counts under various sections of the act, and the first count is based upon Section 19 of the statute *which imposes duties directly and personally upon the mine owner, distinct and separate from the duties required of the servants heretofore referred to;* and even if all the other counts of the declaration were subject to the objection raised by counsel (which we do not by any means admit) this count is obviously not obnoxious to the constitution, even under the theory of plaintiff in error. The verdict in this case is general, and this first count is sufficient to sustain the action, therefore we say the constitutional point attempted to be injected into this case *is not a substantial or essential point in the case,* but on the contrary is entirely academic, and as we understand the law, this appeal should be dismissed.

SUGGESTIONS IN SUPPORT OF MOTION.

We feel impelled to present our motion in this case and the reasons for presenting the same to the court quite fully, because it will be impossible for counsel for defendant in error to appear in person before the court to argue the matter orally. Our client is absolutely without means, even to pay the expenses of counsel to Washington, and therefore we must rely entirely upon the motion and suggestions in support thereof, as herein presented.

The case at bar was tried twice in the Circuit Court and at the close of plaintiff's evidence on the first trial, the jury was instructed to find for the defendant. On appeal to the Circuit Court of Appeals for the Seventh Circuit, the case was reversed and remanded, and the opinion of the court disposes of all the substantial points in the case, including the constitutionality of the Illinois Act involved. The opinion of the Circuit Court of Appeals is found in the 133rd Federal Reporter, 193, and on page 197 the court says:

"Because the selection of a mine manager is thus restricted to a class of men who have passed an examination—cutting off from employment by the proprietor, the whole body of the population who otherwise would be eligible—it is urged upon us, either that the legislature meant to exempt the employer from liability for the defaults of such mine manager, *or that the act, to the extent that it compels a selection from such class, at the same time holding the owner liable for defaults arising therefrom, is unconstitutional;* and in this connection *Durkin* v. *Kingston Coal Co.*, 171 Pa., 193; 33 Atl., 237; 29 L. R. A., 808; 50 Am. St. Rep., 801; *Homer Ramsdell Company* v. *La Campagnie Gen-*

erale Trans-Atlantique, 182 U. S., 406; 21 Sup. Ct., 831; 45 L. Ed., 1155; *Crisp* v. *The United States, etc., Co.* (D. C.), 124 Fed., 748, and other cases, are cited. Some of these cases were under the pilotage laws, requiring that a ship nearing port should take on the first pilot who hailed the vessel, or be liable for full compensation for such pilot. The ship master's choice was thus limited, *not to a class but to an individual.* This difference creates a substantial distinction between those cases and the case under consideration.

The Pennsylvania cases we are unwilling to follow. The authority of Illinois is against them. *Consolidated Coal Company of St. Louis* v. *Frank Seniger,* 179 Ill., 370, 53 N. E., 733; *Riverton Coal Company* v. *John E. Shepherd,* 207 Ill., 395, 69 N. E., 921, as also the substantial considerations underlying the act. The Illinois act was passed under *a mandate of the constitution of Illinois of* 1870 (Article 4, Sec. 29) making it the duty of the legislature to pass laws for the protection of operative miners. It grew out of the public's wish that every precaution should be taken against the unusual hazards and dangers incident to the inhabitancy of mines. It was intended, *and intended rightly,* to protect with all known expedients, every person whose occupation required him to labor in these subterranean rooms and roadways.

The requirements imposed upon the owner are not unnecessarily numerous, strict, or otherwise burdensome. If it be not unreasonable, as certainly it is not, that mine inspectors, mine examiners, and mine managers be competent men, it is equally not unreasonable that they be able to prove by examinations as provided for, the possession of such competency. The restriction on the owner limits him, it is true, to selection from a class; but in practice, if the law be faithfully carried out, the class will include all the available men competent; so that, *in its practical outcome, the act of* 1899 *simply requires that the owner's mine manager shall be a competent man,* his competency to be determined according to standards fixed by the state authority; *and within this area of proven competency—*

and the spirit of the common law gave no larger area—the owner is at liberty to employ and discharge as he chooses."

We respectfully request the court to read the entire opinion of the Circuit Court of Appeals as it throws much light on all the points involved in this controversy.

If the court will refer to Chapt. 93, Rev. Statutes of Ill., entitled "Mines and Miners," it will be observed that Section 6A provides in substance for the appointment of a board of examiners to be known as the State Mining Board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of men seeking certificates of competency as mine managers, hoisting engineers and mine examiners.

Paragraphs D and F of Sec. 7 set forth the qualifications which applicants for the position of mine manager and mine examiner must possess and sets forth substantially the nature of the examination which they must pass before receiving certificates of competency.

Paragraphs E and G of Sec. 8 make it unlawful to employ any person as mine manager or examiner who does not hold a certificate of competency issued by the State Mining Board.

Section 16 of the Act is entitled "Duties of Mine Manager and Miners" and specifies certain duties required to be performed by the mine manager, and Section 18 is entitled "Duties of Mine Examiners" and specifies the duties imposed upon the mine examiner.

Section 19 of the Act is entitled "Ventilation" and reads in part as follows:

"Throughout every coal mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein and such ventilation shall be produced by a fan, or some other artificial means.

(A) The quantity of air required to be kept in circulation and passing a given point shall be not less than 100 cubic feet per minute for each person, and not less than 600 cubic feet per minute for each animal in the mine, measured at the foot of the downcast, and this quantity may be increased at the discretion of the inspector whenever, in his judgment, unusual conditions make a stronger current necessary. Said currents shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder-smoke and deleterious air of every kind.

(B) The measurement of the currents of air shall be taken with an anemometer at the foot of the downcast, at the foot of the upcast, and at the working face of each division or split of the air-current. And a record of such measurements shall be made and preserved in the office, as elsewhere provided in this act.

(C) The main current of air shall be so split or subdivided as to give a separate current of reasonably pure air to every 100 men at work, and the inspector shall have authority to order separate currents for smaller groups of men, if in his judgment special conditions make it necessary.

(G) Cross-cuts shall be made not more than sixty feet apart, and no room shall be opened in advance of the air current.

(H) When it becomes necessary to close cross-cuts, connecting the inlet and outlet air-courses in mines generating dangerous gases, the stoppings shall be built in a substantial manner with brick or other suitable building material laid in mortar or cement, if practicable, but in no case shall they be built of lumber, except for temporary purposes."

The last paragraph of Sec. 33 of the Act reads as follows:

"For any injury to person or property, occasioned by any willful violations of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in case of loss of life by reason of such willful violation or willful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives not to exceed the sum of five thousand dollars."

The first count of the declaration herein is based upon the first paragraph of Section 19, and alleges a willful failure "to maintain in said coal mine currents of fresh air sufficient for the health and safety of said Samuel Fulton contrary to the form of the statute in such case made and provided by means and in consequence of which willful failure on the part of the said defendant to so maintain in said coal mine such currents of fresh air, as aforesaid, a large quantity of dangerous gas was suffered and permitted by the said defendant to accumulate, be and remain through and in the place in said coal mine where the said Samuel Fulton was then engaged at work in the line of his employment." (Rec., 4-5.)

The second and third counts are based upon a failure to construct cross-cuts in the mine, and to maintain stoppings along the airways. (Rec., 5-6.) These duties are required to be performed by the mine manager by Section 16, Paragraph B, and the same duties are also directly imposed upon the mine owner by Section 19, Paragraphs G and H, but as the first count of the

declaration is based upon a paragraph of the act which is so clearly distinct and separate from those portions of the law imposing duties upon the employes, that for the purpose of this motion we rely upon that count.

The law of Illinois is very explicit upon the point that one good count in a declaration will be sufficient to sustain the action under a general verdict.

Section 57 of the Illinois Practice Act, Chapt. 110, Ill. Rev. Stat., reads as follows:

"Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict."

In the case of *City of Chicago* v. *Longergan,* 196 Illinois, pages 518, 520, the Supreme Court of the state held:

"When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count if one or more of the counts be sufficient to sustain the verdict."

In the case of *Consolidated Coal Company* v. *Scheiber,* 167 Ill., 539, 543, the court held:

"The rule at common law was that although there were good counts in the declaration, yet if there were one bad count the judgment would be arrested, but that rule applied only where such bad count was insufficient to support the judgment and not where it would have been held merely defective in stating the cause of action. Our statute has so far changed the rule that where there is an entire verdict on several counts it shall not be set aside or reversed because the declaration contains a defective count if there be one or more counts sufficient to sustain the verdict."

In the case of *C. & A. R. R. Co.* v. *Anderson,* 166 Ill., 572, 575, the court said:

"If there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment the error of the court, if any, in refusal to instruct the jury to disregard the other counts becomes harmless."

By Sec. 914 of the United States Compiled Statutes, title, "The Judiciary," it is provided:

"The practice, pleadings and forms and modes of procedure in civil cases other than equity and admiralty causes in the Circuit and District Courts shall conform as near as may to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

We assume that this court will hold as conclusive the rule of practice established by the statute of Illinois and the decisions of the Supreme Court of the state, and therefore if this first count of the declaration does not fall within the objections raised by plaintiff in error, we believe this court will refuse to take jurisdiction of the case.

It is the established and universal rule of this court that it will not take jurisdiction of a case unless the constitutional point involved in the controversy is a real and substantial point upon the determination of which the result of the suit depends. In the case of *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U. S., 239, 243, 244, this court said, by Judge Fuller:

"When a suit does not *really and substantially* involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States upon the determination of which the result depends, *it is not a suit arising under the constitution or*

laws. And it must appear on the record by a statement in legal and logical form such as is required in good pleading that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground" (citing *Gold Washing & Water Co.* v. *Keyes,* 96 U. S., 199; *Blackburn* v. *Portland Gold Mining Co.,* 175 U. S., 571).

In the case of *Lampasas* v. *Bell,* 180 U. S., 276, 282, this court said:

"This court has only jurisdiction by appeal or writ of error directly from the Circuit Court in certain cases one of which is, 'When the constitution or law of a state is claimed to be in contravention of the Constitution of the United States.' Section 5 of the Judiciary Act of March 3, 1891, C. 517, 26 Stat., 826, 828. *But the claim must be real and substantial. A mere claim in words is not enough.*" The court then quotes with approval the language above quoted from the *Western Union Telegraph Co.* v. *Ann Arbor Railroad Company.* To the same effect is *Shreveport* v. *Cole,* 129 U. S., 36, 41.

Gibbs v. *Crandall,* 120 U. S., 105, 108.
Atarin v. *New York,* 115 U. S., 248, 257.
New Orleans v. *Benjamin,* 153 U. S., 411, 424.
Gold Washing & Water Co. v. *Keys,* 96 U. S., 199, 203, 204

(See also Sec. 5, Chapt. 7, U. S. Compiled Stat., title "The Judiciary.")

Our contention is that even if the court should find that the sections of the Illinois Miners Act, under which certain counts of the declaration are brought, are unconstitutional (which we do not concede), still if Section 19 of the act, which simply requires the mine owner

to properly ventilate his mine, is not obnoxious to the constitution and it appearing to the court upon the face of the record herein that the first count of the declaration is based upon that section of the statute and that the verdict of the jury herein is a general verdict which under the law may be sustained upon one good count of the declaration, then we say that the contention of plaintiff in error must entirely fail and that there is not involved in this suit a substantial or real constitutional point upon which the determination of this case in any wise depends. Even if the court should be inclined to hold that certain portions of the act were unconstitutional, that would not necessarily invalidate the entire law, and unless Section 19 was included in the portions held to be unconstitutional the verdict and judgment in this case would stand as valid.

In the case of *Loeb* v. *Columbia Township Trustees,* 179 U. S., 472, 490, this court held:

"As one section of a statute may be repugnant to the constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand while another will fall unless the two are so connected or dependent on each other in subject matter, meaning or purpose that the good cannot remain without the bad."

To the same effect substantially is the case of *Diamond Glue Company* v. *United States Glue Company,* 187 U. S., 611, 617.

This court we believe will upon its own motion refuse to take jurisdiction of a case where it appears that the judicial power of the court does not extend even if not moved to do so, by either party to the controversy. (See *M. C. L. M. Ry. Co.* v. *Swan,* 111 U. S., 379, 384.)

The sufficiency of every count in the declaration was fully passed upon by the trial court in disposing of the demurrers which were filed to each and all of the counts and again during the trial of the case, on motion to direct a verdict for defendant and later on the motion for a new trial and, therefore, for the purpose of determining the question presented by this motion, we assume that it will not be necessary for this court to pass upon the merits of the various counts of the declaration *as applied to the issues in the case,* but it will only be necessary for the court to examine the record sufficiently to determine whether or not the first count of the declaration, as we claim, is based upon a section of the Miners Act which is not repugnant to the Constitution of the United States.

If the court determines that the first count of the declaration is based upon Section 19 of the statute, and that such section is not obnoxious to the Constitution, then the claim of plaintiff in error that a constitutional question arises in this case necessary to the determination thereof, must fail, and we therefore respectfully submit, that our motion to dismiss the appeal and affirm the judgment of the Circuit Court should be granted, and we pray the court to enter an order so disposing of the case.

Respectfully submitted,

ARTHUR J. EDDY,
P. C. HALEY,
E. C. WETTEN,
Attorneys for Defendant in Error.

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No. 139

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

WILMINGTON STAR MINING COMPANY,
Plaintiff in Error,

vs.

MINNIE FULTON,
Defendant in Error.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ARTHUR J. EDDY,
P. C. HALEY,
E. C. WETTEN,
Attorneys for Defendant in Error.

THE GUNTHORP-WARREN PRINTING CO., 118 E. RANDOLPH ST., CHICAGO

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BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

The jurisdiction of this court is invoked in this case on the ground that the Illinois Mining Act under which the case is brought is repugnant to that portion of the 14th Amendment to the Constitution of the United States, to the effect that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or prop-

erty, without due process of law, nor deny to any person within its jurisdiction equal protection of the laws.

It is claimed that the act by requiring mine managers, mine examiners and hoisting engineers, to obtain certificates of competency before taking such positions, and by enumerating certain duties required of them, and at the same time requiring the mine owner to employ in their mines such certified employes, restricts the mine owners' choice to a class and takes from him in part the control of such employes, while holding him liable for their negligence, and is thereby repugnant to the constitutional amendment referred to. This is the only constitutional point involved in the case.

We deny that the constitutional point attempted to be raised is a real substantial issue in the case, necessary to its decision, and have discussed this question at some length under separate cover in the form of a motion to dismiss the writ of error herein, and respectfully refer the court to the suggestions presented in support of that motion. However, that motion is based only on the face of the record before the court and the merits of the case are not touched upon in any regard. Therefore we feel it our duty to discuss the various points in the case fully, as owing to the financial circumstances of defendant in error it will be impossible for her counsel to appear before the court in person to argue the case orally.

This suit was originally instituted in the Circuit Court of Grundy County, Illinois, and was removed by plaintiff in error to the United States Circuit Court

on the ground of diversity of citizenship. Upon the first trial of the case in that court the jury were instructed by the trial judge to find for the defendant. The plaintiff appealed from the judgment of the court to the Circuit Court of Appeals for the Seventh Circuit, and the case was reversed and remanded by that court. (See *Fulton* v. *Wilmington Star Mining Co.*, 133 Fed. Rep., 193.) The court of appeals in its opinion passed upon all the substantial questions now submitted for the consideration of this court.

The suit was brought by Minnie Fulton, the defendant in error, to recover damages under the statute, for loss of support suffered by herself and her five small children by reason of the killing of her husband, Samuel Fulton, in the coal mines belonging to plaintiff in error.

The accident complained of herein occurred in the west roadway of what was known as Mine No. 6 situated at Coal City, Grundy County, Illinois. This was a new mine and the excavations necessary for working it to its full capacity were not completed. (Rec., 62.)

By reference to the plat (Rec., 61) it will be seen, that four principal roadways extended from the main shaft running respectively north, south, east and west. The south and west roadways were not connected with the escapement shaft and had no natural ventilation whatsoever, so that the only way to force air into these roadways and thereby dislodge the accumulations of gas, was by means of a fan run by steam power.

On Sunday, January 27, 1901, Samuel Fulton went to the mine by direction of John Wilson, the com-

pany's mine manager to lay tracks in the west roadway. Wilson, the mine manager, and Pierard, the mine examiner and two laborers named respectively Moses Capet and Leopold Schmitz, were also present to do certain work in connection with the ventilation of the mine. Pierard and Capet arrived at the mine a little before seven in the morning and immediately descended into the mine and went into the south roadway and started work there (Rec., 33) putting in air boxes to aid in the ventilation of that roadway. Fulton arrived at the top of the mine at about the same hour, but stopped to put some tools and material necessary for his work on a car and in this was assisted by Wilson, and somewhere between 7:30 and 8 o'clock they descended into the mine. (Rec., 51 and 65.)

Upon their arrivel at the foot of the shaft the other men congregated together, and for the first time an effort was made to start up the ventilation. To do this it was necessary to start the fan going, and it appears that a wheel on one of the valves of the pump was missing and it was necessary in order to turn it to go to the surface and procure a monkey wrench. This was done by Wilson (Rec., 34) and upon his return the steam was turned on and the fan started. *This must have been nearly an hour after the mine examiner first entered the mine.* As soon as the fan was started Pierard, Schmitz and Capet went into the south roadway to resume their work (Rec., 35), Wilson and Fulton remaining at the foot of the shaft. In a few minutes thereafter Wilson called to Schmitz to go and assist Fulton. Schmitz testified, that Wilson was present at the bottom of the shaft when he started to help Fulton with his work. He said

that Wilson was near the little engine when they started to push their car into the west roadway and was right close to him, in fact he had to push Wilson back with his hand so that the rails on the car would not strike him. (Rec., 53.) And further on (Rec., 56) he testified, that Wilson told him not to wait but to go with Fulton. As soon as they departed Wilson returned to the south roadway and within a few moments a tremendous explosion occurred (Rec., 53) which knocked down Wilson, Pierard and Capet and put out the lights they were carrying; at the time they were from 100 to 150 feet away from the point where Fulton's body was found and there was a thick wall of coal between them. Upon recovering they went into the west roadway and met Schmitz crawling out and found the dead body of Fulton lying on his back at a point about 80 or 100 feet west of the main shaft. (Rec., 37.)

It is admitted by Wilson and Pierard (Rec., 39-70), that it was well known that there was gas in the west roadway and Pierard testified (Rec., 32, 33) that he generally started the fan in the morning about 5 o'clock, that is, about an hour or an hour and a half before the men went to work, and that in addition to this he used a sack or some other similar article to assist in dislodging the accumulations of gas (Rec., 32), and then went down with a safety lamp to examine the mine and see that it was all right before the miners went to work, but on this morning (Rec., 34) although he knew there was gas in the mine and that the men were coming down to work he made no effort to clear it of gas.

Wilson, the mine manager also testified, that there was always gas in the west entry (Rec., 70), and he knew that Fulton was to work in that roadway (Rec., 65), in fact he had so instructed him.

It is also admitted, that this roadway was not completed and the circuits which would eventually give it natural ventilation, at the time were not completed. (Rec., 62.)

The court will observe that defendant in error was somewhat handicapped in proving her case by the fact that Fulton was instantly killed, and Schmitz was a foreigner and his deposition was taken through an interpreter while he was laid up from the injuries he received at the same time that Fulton was killed and before the trial of the case Schmitz died of his injuries, therefore defendant in error was obliged to rely largely on the testimony of the company's own employes and officials who were in a sense hostile to her interests, because of their natural unwillingness to admit negligence and further because the statute imposed penalties for the very acts and omissions which it is alleged in this case they were guilty of.

POINTS AND AUTHORITIES.

I.

THE CONSTITUTIONAL QUESTION RAISED IN THIS CASE IS NOT A SUBSTANTIAL POINT UPON WHICH THE DETERMINATION OF THE CASE DEPENDS.

The case at bar is not subject to the constitutional objection raised by plaintiff in error for the reason that the declaration contains counts based on certain sections of the act *obviously* not repugnant to the Constitution of the United States even under the theory of plaintiff in error.

See first three counts of declaration (Rec., 4-5), and in connection therewith, Section 19 of Chapter 93 Illinois Revised Statutes, title, "Mines and Miners."

Sec. 57 of the Illinois Practice Act, Chap. 110, Rev. Stat., reads as follows:

> "Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict."

In the case of *City of Chicago* v. *Lonergan*, 196 Illinois, pages 518, 520, the Supreme Court of the state held:

> "When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count if one or more of the counts be sufficient to sustain the verdict."

To the same effect are the following cases:

Consolidated Coal Co. v. *Scheiber*, 167 Ill., 539, 543.

C. & A. R. R. Co. v. *Anderson*, 166 Ill., 572-575.

By Sec. 914 of the United States Compiled Statutes, title, "The Judiciary," it is provided:

> "The practice, pleadings and forms and modes of procedure in civil cases other than equity and admiralty causes in the Circuit and District Courts shal conform as near as may be to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

This court has uniformly held, that the constitutional point involved must be a real and substantial point in the controversy upon the determination of which the result depends.

Western Union Tel. Co. v. *Ann Arbor R. R. Co.*, 178 U. S., 239, 243-244.

Lampasis v. *Bell*, 180 U. S., 276, 282.

Gibbs v. *Crandall*, 120 U. S., 105, 108.

Atarin v. *New York*, 115 U. S., 248, 257.

New Orleans v. *Benjamin*, 153 U. S., 411, 424.

Gold Washing & Water Co. v. *Keyes*, 96 U. S., 199, 203-4.

Even if the court should be inclined to hold portions of the Mining Law unconstitutional, it would not

necessarily invalidate the entire act, and if any count of the declaration is based on a section of the act held to be constitutional, it would be sufficient to sustain the action.

Loeb v. *Columbia Township Trustees*, 179 U. S., 472, 490.

Diamond Glue Co. v. *U. S. Glue Co.*, 187 U. S., 611, 617.

II.

THE MINING ACT OF ILLINOIS IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

It has always been the policy of the State of Illinois to guard with great solicitude the persons and lives of men employed in coal mining in this state. The Constitution of the state imposes upon the legislature the duty of passing laws to carry out this policy. Sec. 29 of Article 4 of the Constitution of 1870, reads as follows:

> "It shall be the duty of the General Assembly to pass such laws as may be necessary for the protection of operative miners by providing for ventilation when the same may be required and the construction of escapement shafts with such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."

In pursuance of this constitutional provision the legislature of Illinois has from time to time passed laws for the protection of coal miners and has fre-

quently revised such laws, all with the purpose of surrounding the miner with greater protection.

C. W. & V. Coal Co. v. *The People,* 181 Ill., 270, 274 to 276.

Carterville Coal Co. v. *Abbott,* 181 Ill., 495, 500.

The constitutionality of the Mining Act has been attacked in the Supreme Court of the state and has been held to be constitutional by that court.

C. W. & V. Coal Co. v. *The People,* 181 Ill., 270, 272 to 278, inclusive, and cases cited therein.

The cases relied upon by plaintiff in error decided by courts outside of this state have been held to have no application to cases arising under the act in question.

When this same case was before the Circuit Court of Appeals, 7th circuit, the court after discussing the cases cited by plaintiff in error in support of the same proposition in that court, said:

> "The Pennsylvania cases we are unwilling to follow. The authority of Illinois is against them. *C., C., C. of St. L.* v. *Seniger,* 179 Ill., 370, *Riverton Coal Co.* v. *Shepherd,* 207 Ill., 395, as also the substantial considerations underlying the act. The Illinois act was passed under a mandate of the Constitution of Illinois of 1870 (Art. 4, Sec. 29) making it the duty of the legislature to pass laws for the protection of operative miners. * * *
>
> The restriction on the owner limits him, it is true, to selection from a class; but in practice, if the law be faithfully carried out, *the class will*

include all the available men competent; so that in its practical outcome, the act of 1899 *simply requires that the owner's mine manager shall be a competent man, his competency to be determined according to standards fixed by the state authority; and within this area of proven competency —and the spirit of the common law gave no larger area—the owner is at liberty to employ and discharge as he chooses."*

Fulton v. *Wilmington Star Mining Co.*, 133 Fed., 193-7.

In the case of *Henrietta Coal Co.* v. *Martin*, 221 Ill., 460, substantially the same argument was presented to the court as in this case and the very same cases now cited by plaintiff in error in support of its propositon were presented to that court, and the court discusses the cases fully and refuses to follow them on the ground that they are not consonant at all with the policy of the law of Illinois.

On pages 466-67 the court says:

"*They*—(the mine manager and examiner)—*stand for him and are vice-principals, and perform those duties, which he may not delegate to others in such manner as to relieve himself of responsibility. For any willful violation of the statute by either of them, or for any willful failure by either of them to observe its provisions, he is liable.* Such has heretofore been assumed to be the law by this court. *Donk Bros. Coal and Coke Co.* v. *Peton*, 192 Ill., 41; *Donk Bros. Coal and Coke Co.* v. *Stroff*, 200 id., 483; *Kellyville Coal Co.* v. *Strine*, 217 id., 516; *Taylor Coal Co.* v. *Dawes*, 200 id., 145.

The fact that the proprietor, if he employs men to act in these capacities, is required to employ those who have obtained the certificate from the

state mining board is without significance. The purpose of that provision was, so far as possible, to guard against the possibility of the proprietor employing incompetent, intemperate, negligent or disreputable persons, and not to enable the operator to shift to his employes his responsibility for the management of the mine.

The object of the Mining Act, as we gather from its various provisions, is to protect, so far as legislative enactment may, the health and persons of men employed in the mines of the state while they are in the mines. The principal measures prescribed for this purpose require the exercise of greater precaution and care on the part of the mine owner for the safety of the miners than was required by the common law. *To hold that he may shift his liability to any person employed by him as examiner or manager who holds the certificate of the state mining board is to lessen his responsibility and defeat in great part the beneficent purposes of the act. To hold him liable for a willful violation of the act or a willful failure to comply with its provisions on the part of his examiner or manager, is to give force and effect to the statute according to the intent of its makers and to prolong the lives and promote the safety and well being of the miners.*"

In the case of *Sherlock et al.* v. *Alling, Admr.*, 93 U. S., 99, 105, 108, inclusive, the liability of owners of a line of steamers for the negligence of pilots employed by them was passed upon by this court, and the same contentions raised here were presented in that case and the court held (quoting the 4th section of the syllabus, 100):

"The relation between the owner or master and pilot, as that of master and employe, is not changed by the fact that the selection of the pilot

is limited to those who have been found by examination to possess the requisite knowledge and skill, and have been licensed by the government inspectors."

In the case of *Consolidated Coal Co.* v. *Seniger*, 179 Ill., 370, 374, 375, the court says:

"As to the other objection, it seems defendant was prohibited by law from employing a hoisting engineer who did not have a certificate obtained from the state board of mine examiners, and Rasor had such a certificate. It is argued that by this statute the law has provided the only means by which a hoisting engineer's abilities can be ascertained, and that the efficacy of the certificate for that purpose cannot be disputed. *While the law required defendant to select its engineer from a certain class, it did not make it obligatory upon it to employ Rasor or to retain him in its employment.* It would not have been a violation of any law to have discharged him if he was found to be incompetent. If defendant had been *compelled* to employ him, there would, of course, be no element of negligence on its part in doing so, and it could not be held liable for a violation of the law on account of his unfitness. Such a certificate does not conclusively establish the competency of the person, but may be considered with other evidence upon that question. The state board of mine examiners had no power to adjudicate upon the question so as to bind the defendant or its men, and plaintiff was not debarred from proving that Rasor was in fact incompetent and unfit and that defendant had notice of it."

In *Wellston Coal Co.* v. *Smith*, 65 Ohio State, 70, the first section of the syllabus reads as follows:

"A mine boss, who has control of a mine, with

> power to hire and discharge employes, stands for and in place of the owner or operator of such mine as to matters between such employes and owner or operator, in the operation of such mine; AND THE OWNER OR OPERATOR IS CHARGEABLE WITH WHATEVER SUCH BOSS KNOWS, OR OUGHT TO KNOW, IN THE OPERATION OF SUCH MINE."

In Huffuct on Agency, Chap. 19, p. 286, title "Compulsory Employment or Service," the pilot cases are considered and distinguished, and it is said:

> "The case of limited selection has generally been decided in accordance with the usual doctrine of master and servant. So long as there is a power of selection, EVEN THOUGH AMONG A SMALL NUMBER the employer chooses his own servant, and must remain liable for his acts within the scope of the employment."

See, also:

Riverton C. Co. v. *Shepherd,* 207 Ill., 395-9.

Schmalstieg v. *Leavenworth Coal Co.,* 59 L. R. A., 707.

III.

CONSTRUCTION OF THE MINING ACT BY THE SUPREME COURT OF ILLINOIS.

The Supreme Court of Illinois has construed the Mining Act in a great many cases and has always sought to effectuate the evident purpose of the framers of the Constitution and the legislature to protect the operative coal miner as far as possible in his dangerous occupation, and to provide for those dependent upon him in case of his death through failure on

the part of the mine owner, and his representatives to fulfill the duties required by the statute.

C. W. & V. C. Co. v. *The People*, 181 Ill., 270, 273-6, inc.

Carterville Coal Co. v. *Abbott*, 181 Ill., 495, 501-2.

Deserant v. *Cerillos C. R. R. Co.*, 178 U. S., 409, 420.

Odin Coal Co. v. *Denman*, 185 Ill., 413, 417.

In the last case cited the court declared the statute in question was not a penal statute.

The word "*willful*" as used in the statute, has repeatedly and universally been held by the Supreme Court of Illinois to mean that the person of whose action or default the expression is used, is a free agent and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this: that he knows what he is doing and intends to do what he is doing and is a free agent. *An act consciously omitted is willfully omitted* in the meaning of the word, "*willful*" as used in these enactments of the legislature relative to the duty of mine owners. Where an owner, operator or manager so constructs or equips his mine that he *knowingly* operates it without conforming to the provisions of this act, he *willfully* disregards its provisions and *willfully* disregards the safety of miners employed therein.

Odin Coal Co. v. *Denman*, 185 Ill., 413, 418.

Carterville Coal Co. v. *Abbott*, 181 Ill., 495, 502.

I. C. R. R. Co. v. *Leiner,* 202 Ill., 624, 629-631, inc.

Donk Brothers Coal Co. v. *Stroff*, 200 Ill., 483, 489.

Donk Brothers Coal Co. v. *Peton,* 192 Ill., 41, 44, 45.

Spring Valley Coal Co. v. *Kowatt*, 196 Ill., 156, 160.

In this connection we invite the attention of the court to the fact that in Illinois the mine manager and mine examiner have been expressly held to be the vice-principals of the mine owner for whose violation of the statute he is liable. The Supreme Court of Illinois has held, speaking of these employes:

> "We think the effect of the statute is to require of the *owner of the mine* the performance of those duties which the statute prescribes for the mine examiner and the mine manager. * * * *They stand for him and are vice-principals,* and perform those duties which he may not delegate to others in such manner as to relieve himself of responsibility for any willful failure by either of them to observe its provisions but is liable."

Henrietta Coal Company v. *Martin,* 221 Ill., 460, 466.

Riverton Coal Company v. *Shepherd,* 207 Ill., 395, 399.

Plaintiff in error being a corporation could only act or have knowledge of an existing condition by and through its officers agents and employes, and the representatives in charge of the mine in question in this case were Wilson, the mine manager and Pierard, the

mine examiner. Notice to them of dangerous conditions in the mine was notice to the company of such conditions and their acts and omissions were the acts and omissions of plaintiff in error.

Quincy Coal Company v. *Hood, Administrator,* 77 Ill., 68, 75.

P. S. L. A. S. v. *Cannon,* 201 Ill., 260, 262.

D. & R. G. Ry. Co. v. *Harris,* 122 U. S., 597, 608, 609.

L. S. & M. S. Ry. Co. v. *Prentiss,* 147 U. S., 101, 109-111, inc.

The decisions of the highest courts of a state construing a statute of such state are conclusive and as binding as the text of the law, especially where the act is passed in conformity to the requirement of the state constitution and the statute itself relates entirely to local policy.

Balkam v. *Woodstock Iron* Co., 154 U. S., 177, 189.

Bauserman v. *Blunt,* 147 U. S., 647, 654.

Norton v. *Shelly County,* 118 U. S., 425, 440.

S. C. Ry. Co. v. *N. A. T. Co.,* 173 U. S., 99, 112.

Y. & M. V. Ry. Co. v. *Adams,* 181 U. S., 580, 583.

IV.

PROXIMATE CAUSE.

The fact that the west roadway was full of gas was the proximate cause of Fulton's death. None of the

other acts and omissions complained of would have harmed him had plaintiff in error fulfilled its primary duty in regard to freeing the mine from gas and seeing that it was properly ventilated. Proximate cause has been defined by the Supreme Court of Illinois as follows:

> "If the wrong of appellant put in motion the destructive agency and the result is directly attributable thereto and there was no intervention of a new force or power of itself sufficient to stand as the cause of the mischief the negligence of appellant must be considered the proximate cause of the injury, if it could have been foreseen by the exercise of ordinary care that injury might or would result from the negligence. An intervening efficient cause is a new and independent force which breaks the causal connection between the original wrong and the injury, and itself becomes the direct and immediate, that is, proximate, cause of an injury."
>
> *Pullman Palace Car Co.* v. *Laack,* 143 Ill., 242, 260-261.

V.

CONTRIBUTORY NEGLIGENCE ON THE PART OF FULTON WOULD NOT DEFEAT THE RIGHT OF DEFENDANT IN ERROR TO RECOVER IN THIS CASE.

"Mere contributory negligence on the part of a miner *will not defeat a right of recovery* where he is injured by the willful disregard of the statute, either by an act of omission or commission on the part of the owner, operator or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is

injured in a mine because the owner, operator or manager totally disregarded the statute as in other cases of negligence *is to totally disregard the provisions of the Constitution which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute and in no manner regard the duty of protecting the life and safety of miners.*"

Carterville Coal Co. v. *Abbott,* 181 Ill., 495, 502-3.

Henrietta Coal Co. v. *Martin,* 221 Ill., 460-470.

Riverton Coal Co. v. *Shepherd,* 207 Ill., 395, 399.

O'Fallon Coal Co. v. *Laquet,* 198 Ill., 125, 129.

Spring Valley Coal Co. v. *Rowatt,* 196 Ill., 156, 159, 161.

Pawnee Coal Co. v. *Royce,* 184 Ill., 402, 415.

Odin Coal Co. v. *Denman,* 185 Ill., 413, 419.

W. A. C. Co. v. *Beaver,* 192 Ill., 333.

Deserant v. *C. C. R. R. Co.,* 178 U. S., 409, 420.

It will never be presumed that a man will knowingly incur physical pain or death when he can avoid it. The presumption is, that the instinct of self-preservation will deter a man from so doing.

C. & E. I. R. R. Co. v. *Knapp,* 176 Ill., 127, 129.

C. & E. I. R. R. Co. v. *Hines,* 132 Ill., 161, 169.

The deceased had a *right to assume* that plaintiff in error would comply with its statutory duty and *was not*

bound to ascertain before going to work each time whether or not it was so doing.

Pawnee Coal Co. v. *Royce,* 184 Ill., 402, 415.
Hemingway v. *I. C. R. R. Co.,* 114 Fed. Rep., 843, 846. (C. C. A.).

The question as to whether or not an act of negligence amounts to willfulness is always for the jury.

In the case of *I. C. R. R. Co.* v. *Leiner,* 202 Ill., 624-9 the court says:

> "The question, whether a personal injury has been inflicted by willful or wanton conduct or gross negligence, *is a question of fact to be determined by the jury.* In *Chicago, Burlington and Quincy Railroad Co.* v. *Murowski,* 179 Ill., 77, we said (p. 80): 'Whether the defendant was guilty of willful or wanton conduct or gross negligence was purely a question of fact for the jury to determine from all the evidence, introduced by the respective parties, bearing upon that point in the case, and *it was not the province of the court to inform the jury that some particular fact in the case was conclusive of that question.*' (See, also, *Odin Coal Co.* v. *Denman,* 185 Ill., 413; *Carterville Coal Co.* v. *Abbott,* 181 id., 495; *Lake Shore and Michigan Southern Railway Co.* v. *Bodemer,* 139 id., 596.)"

Chicago T. R. R. Co. v. *Gruss,* 200 Ill., 195.
Donk Bros. Coal Co. v. *Peton,* 192 Ill., 41, 44.
Odin Coal Co. v. *Denman,* 185 Ill., 413, 419.
C., B. & Q. R. R. Co. v. *Murowski,* 179 Ill., 77-80.

VI.

THE JURY WERE FULLY INSTRUCTED AS TO THE EFFECT OF A WILFUL VIOLATION OF THE MINING ACT BY FULTON.

VII.

ALL THE COUNTS OF THE DECLARATION WERE SUPPORTED BY EVIDENCE, AND THE ISSUES RAISED WERE PROPERLY LEFT TO THE JURY, AND IF THE EVIDENCE SUPPORTED ONE GOOD COUNT OF THE DECLARATION, THAT WOULD BE SUFFICIENT TO SUSTAIN THE ACTION.

(In this connection, see authorities cited under point III.)

ARGUMENT.

I.

THE CONSTITUTIONAL QUESTION RAISED IN THIS CASE IS NOT A SUBSTANTIAL POINT UPON WHICH THE DETERMINATION OF THE CASE DEPENDS.

In connection with the first point we present for the consideration of the court, we respectfully direct the attention of the court to the suggestions in support of our printed motion to dismiss the writ of error, heretofore filed in this cause. We discussed therein the points and authorities we deemed pertinent to this question and desire to avoid trespassing on the time and patience of the court by needless repetition. For the convenience of the court, however, we recapitulate as concisely as possible the points upon which we rely in support of the position we take with regard to this question before the court.

Plaintiff in error bases its contention that the Mining Act is unconstitutional upon the theory that Section 7, paragraphs "D" and "F" provides for an examination as to competency to be taken by persons seeking certificates as either mine manager or mine examiner and Section 8, paragraphs "E" and "G" makes it unlawful to employ any person in either of the aforesaid capacities unless he holds a certificate issued by the state mining board, while Sections 16 and 18 of the act impose specified duties upon the mine manager and mine examiner, respectively, thereby, it is claimed, restricting the employer in his selection of

his servants and to some extent taking from him the control of such employes, and at the same time making him responsible for their acts and omissions in violation of the statute.

This theory, we contend, is without foundation, for the reason that the employer's choice is not limited to an individual or a small class but in fact his choice is only restricted to those who have been able to prove their fitness to take the responsible positions offered them and the duties required of them amount to no more than the duties imposed upon the mine owner personally by the statute, the common law and by the law of humanity, to make the surroundings of his servants as free from danger as possible considering the nature of their employment.

Again, we claim that on the face of the record it is obvious that the point contended for by plaintiff in error is not substantially involved herein, nor is it necessary to the determination of the case.

The declaration in this case as it now stands consists of eight counts based upon alleged violations of various sections of the Mining Act of Illinois. The first of the eight counts (see record 4 and 5) is based upon Section 19 of the Mining Act, title "Ventilation" which section we maintain imposes the duty to properly ventilate the mine and see that proper air currents are maintained therein directly and personally upon the mine owner, entirely distinct from the duties which are required to be performed by the mine manager and mine examiner by Sections 16 and 18 of the Act. We therefore contend that if this first count is found by the court to be based upon Section 19 and that sec-

tion is held to be not repugnant to the Constitution of the United States, as contended for by plaintiff in error, then there being no substantial constitutional question involved in this dispute necessary to its determination, the writ of error should be dismissed and the judgment of the trial court affirmed. Under Point I, of "Points and Authorities" herein we have set forth the section of the Illinois Practice Act, which provides that, "whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict." (See also cases cited under "Points and Authorities" 1). It is provided by the United States statutes that the practice in the Federal Courts in civil cases other than equity and admiralty causes shall conform to the practice of the court of the state within which the Federal Courts are held. We contend therefore that the verdict in this case being general, brings the case within the rule of practice cited.

It has been uniformly held by this court that in order to invoke the judicial power of the court *the constitutional question involved must be a real and substantial point in the controversy upon which the determination of the case depends.* (See cases cited under "Points and Authorities" I.) If, upon an examination of the record the court finds that this first count of the declaration is based upon a section of the Mining Act, not subject to the objection raised by counsel for plaintiff in error herein, then the constitutional point sought to be injected into this case is not at all necessary to the determination thereof.

Even if certain sections of the Mining Act are *prima facie, open to the constitutional objection raised by* plaintiff in error, that would not by any means invalidate the entire act, and if it be determined that the first count of the declaration is based on a section of the act not open to question in this regard it will be sufficient to sustain the action. (See cases cited under "Points and Authorities" I.)

If the court holdes with us on this first proposition, we assume it will decline to consider the other questions presented by plaintiff in error for its consideration and therefore we desire at this time to renew our motion to dismiss the writ of error herein and to affirm the judgment of the Circuit Court.

II.

THE MINING ACT OF ILLINOIS IS NOT REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

A great many cases have arisen in Illinois based upon the Mining Act, and the Supreme Court of Illinois has had occasion to construe the act under every theory, we believe, that the ingenuity of counsel has been able to advance as to the validity of the various provisions of the act.

It has always been the policy of this state to guard with great solicitude the persons and lives of miners and in order to insure the enactment of proper legislation to safe guard them as far as possible the State Constitution imposes upon the legislature the duty of passing laws to carry out this policy (Sec. 29, Art. 4,

Ill. Constitution of 1870, "Points and Authorities" II). The Mining Act as it now appears upon the statute books of Illinois is the result of many revisions and amendments all intended to more fully protect the coal miner and his family ("Points and Authorities" II). If the court should adopt the theory of plaintiff in error that the owner of a coal mine is not liable for the acts and omissions of the mine manager and mine examiner, employed by him in the coal mine simply because they are required to obtain certificates of competency from the State Mining Board and because certain duties required of them are enumerated by the statute, it would absolutely nullify the intended purpose of the act. As a rule these coal mines are owned by corporations who can only act through their agents, servants and employes, and the only servants and agents of these mining companies who stand as the vice-principals of the company in the coal mine are the mine manager and mine examiner. These men are seldom so financially responsible as to be able to respond in damages to the operative coal miner or his family who may suffer by reason of the negligence of such vice-principal, and if the mine owner be allowed to delegate all responsibility in this regard to these irresponsible employes, the injured person would be without remedy to recover compensation for any loss and injury he might sustain while working for such mine owner. Such a condition is repugnant to the letter and the spirit of the Constitution of Illinois, and to the Mining Act passed in obedience to the constitutional requirement. The question raised by plaintiff in error that the mine owner should not be held re-

sponsible for the acts of the mine manager and mine examiners has been passed upon repeatedly in Illinois.

This case when first tried in the United States Circuit Court was taken from the jury and a judgment entered in favor of plaintiff in error. A writ of error was sued out and the case taken to the Circuit Court of Appeals for the Seventh Circuit. (*Fulton* v. *Wilmington Star Mining Co.*, 133 Fed., 193-7.) In that court the same theory was advanced as to the constitutionality of the act as is here presented by plaintiff in error, and the same authorities were presented to that court that are now presented to this court in support of the theory advanced, and the court refused to follow those cases as being against the authority of Illinois and not in conformity to the spirit of the Constitution of Illinois, and the legislation enacted in conformity thereto. The Supreme Court of Illinois in the very late case of *Henrietta Coal Co.* v. *Martin*, 201 Ill., 460-6-7 has disposed of the very same proposition and the cases from other states now presented to this court in support of the contention of plaintiff in error were cited to the Illinois Supreme Court, and that court refused to follow the authorities presented. The same question in substance was presented to this court in the case of *Sherlock, et al.* v. *Alling, Admr.*, 93 U. S., 99-105-108, and it was held that the master was not relieved from liability for his servant's act simply because his choice was restricted to a class who were obliged to pass an examination as to their competency before taking positions. In the case of *Consolidated Coal Co.* v. *Senigar*, 179 Ill., 370-4-5, the Supreme Court of the state disposed of this contention.

We have quoted so fully from the cases cited in support of our position under "Points and Authorities II.," that we do not feel like burdening the court with again setting forth here excerpts from the opinions in the cases relied upon, but respectfully direct the attention of the court to the quotations hereinbefore set forth.

The Mining Act is a matter of strictly local policy within the State of Illinois and the decisions of the courts of other states have no bearing upon the question except perhaps upon points in doubt. It will be readily seen that no doubt exists as to the points raised by counsel for plaintiff in error in this case. The language of our own court could not be clearer and stronger than it is. At common law the mine owner would unquestionably be liable for the negligent acts of its vice-principals in charge of the workings of the coal mine, and if the law of Illinois by compelling him to employ men whose competency has been certified to by the State Mining Board shall be held to relieve him from all liability for their acts, it simply upsets the entire policy of this state with regard to the protection of its coal miners and renders null and void all legislation passed for their protection, as well as the long and uniform line of decisions rendered by the Supreme Court of the state construing the act involved. A glance at Section 7 of the Mining Act, paragraphs D and F, which set forth in substance the nature of the examination which the mine manager and mine examiner must take before receiving their certificates will show to the court that it is not of a highly technical nature but simply sufficient to satisfy the Mining Board that the applicants are sufficiently com-

petent to fill positions and perform duties where the lives of hundreds of men, sometimes, depend upon their judgment and knowledge. The mine owner himself, may, if he choose, take this examination and perform the duties required, or if he does not choose so to do he has so large a class of men to choose from that his choice is practically unlimited and as the courts have held, upon the slightest sign of incompetency the employer has the unrestricted right to discharge the incompetent employe and replace him with one worthy of the position. If the choice of the employer was limited as in the Pilot cases, to the first individual presenting himself for employment, it would be a very different proposition, and that distinction has been repeatedly recognized by the courts in passing upon questions similar to that presented here. The Circuit Court of Appeals in its opinion in this case (133 Fed., 197), cite a number of the cases presented in support of the contention of plaintiff in error in this case and state:

> "Some of these cases were under the pilotage laws requiring that a ship nearing port should take on the *first* pilot who hailed the vessel or be liable for full compensation for such pilot. The shipmaster's choice was thus limited, not to a class, *but to an individual. This difference creates a substantial distinction between those cases and the case under consideration.*"

We cannot see that the constitutional rights of plaintiff in error are abridged in any degree by the Mining Law of Illinois or any section thereof, or that its common law liability for the negligence of its vice principals is to an unwarranted extent enlarged.

III.

CONSTRUCTION OF THE MINING ACT BY THE SUPREME COURT OF ILLINOIS.

An examination of the Illinois cases cited under point III will show the court how important the Supreme Court of this state has regarded the laws enacted for the protection of miners and their families.

In *C. W. & V. Coal Co.* v. *The People,* 181 Ill., 270, the court says, on page 276:

> "The mining of coal is recognized as a dangerous and hazardous business, and is a productive industry of the greatest importance. For many years in this state many thousands of men have been engaged in that character of work, and a proper safeguard of their lives and health *is a matter of so great interest and necessity that no subject can be mentioned where there is a more positive necessity for the exercise of the police power than in seeking to subserve their safety.*"

The mine owner has always been held liable for the willful violation of the statute by the mine manager and mine examiner.

In the two very late cases of *Henrietta Coal Co.* v. *Martin,* 221 Ill., 460-6, and *Riverton Coal Co.* v. *Shepherd,* 207 Ill., 395-9, the Illinois court has held these employes to be vice principals of the mine owner (Point III), and that he could not delegate the duties he owed to the operative coal miner to these men so as to relieve himself of liability for their failure to observe the provisions of the statute.

The courts of Illinois have uniformly held, that any

act or omission in violation of the statute on the part of the mine owner or his representative in the mine, consciously and knowingly done or omitted, was "willful" within the meaning of the act.

Odin Coal Co. v. *Denman*, 185 Ill., 413-418, and cases cited under Point III.

Wilson testified (Rec., 70):

"On that Sunday morning from past experience *I knew that there was gas in the west roadway.* I knew that was why the fan was put in; we all knew that. *I knew those men were going there to work and were expecting to start in at seven o'clock in the morning.* I didn't get there quite at seven. *I permitted those men to go into the mine knowing there was gas in the west roadway.*"

Pierard testified (Rec., 34):

"I knew at the time there was gas in the mine in that section; always had some in it. * * * *I didn't make any effort to get the gas out.*"

In many other places in the record these vice principals of the mine owner admit their knowledge of the presence of gas in the mine and we therefore contend that their acknowledged failure to clear the mine and render it safe for Fulton to work in was a violation of the requirements of the statute committed knowingly and consciously and therefore under the decisions of the Illinois Supreme Court committed willfully.

Plaintiff in error being a corporation could only act through its agents and employes, and in this coal mine the only representatives of the owner in authority were the mine manager and examiner, therefore if this mine owner be held not liable for their acts of negligence, it escapes entirely and the widow and children of the dead coal miner are denied the finan-

cial relief intended to be secured to them by the Constitution and laws of Illinois.

In this connection we draw the court's attention to the rule cited under point III, that the decisions of the highest courts of the state construing a statute of such state are conclusive and as binding as the text of the law, especially where the act is passed in conformity to the requirement of the state Constitution and the statute itself relates entirely to local policy.

Balkam v. *Woodstock Ins. Co.*, 154 U. S., 177-189. (And other cases cited.)

IV.

PROXIMATE CAUSE.

Counsel for plaintiff in error complain of the instructions of the court to the jury, as to the proximate cause of Fulton's death. We cannot see that any real or just fault can be found with the instructions.

Counsel endeavor to convince the court that the command of Wilson to Fulton and Schmitz to go into the west roadway was an act which might be considered as the efficient or proximate cause of Fulton's death and insist that this question should have been considered distinct and separate from the question as to whether or not there was gas in the mine. We cannot see how this act of Wilson's standing alone could have caused Fulton's death. It is only when taken in connection with his failure to clear the mine from gas, that the order of Wilson has any bearing on the case.

The first count of the declaration is based upon the

fact, that plaintiff in error failed to ventilate its mine, and to maintain therein sufficient currents of fresh air for the safety of the men working therein, and by Sec. 19 of the Mining Act the mine owner is required to see that his mine is properly ventilated and made safe for the miners to work in. The fact that the west roadway was full of gas and thereby made dangerous for Fulton and Schmitz to work in, was the primary act of negligence which constituted the proximate cause of the death of Fulton and the injuries to Schmitz. If plaintiff in error had fulfilled its duty as required by the statute in the matter of ventilating this roadway, Wilson's instruction to the men would have been an entirely immaterial matter and of itself could necessarily cause them no harm. It was only taken in connection with the principal or primary act of negligence that it could have caused any harm to the workmen.

The testimony of Schmitz to the effect that Wilson told him and Fulton not to wait, but to go into the mine (Rec., 56), as well as his evidence that Wilson was so close to them when they pushed the car into the west roadway that he had to push him back with his hand, so that the rails would not touch him, and that Wilson was looking at them all the time (Rec., 53), *was simply introduced to show knowledge on the part of this representative of the mine owner of the fact, that these men were going into that roadway to work.*

The instruction of the court complained of (Rec., 97-98) if read in its entirety in connection with the other instructions of the court, placed this question before the jury as strongly as plaintiff in error was entitled to have it placed.

Counsel admit that gas in the mine was essential to the fatal result, but contend that in law that fact might not be the efficient cause of such result.

Of course if the presence of the gas was not itself due to the negligence and violation of the statute by plaintiff in error, there might, perhaps, be some color to the argument of counsel, but in this case the presence of gas in the mine at this time and under the circumstances shown by the evidence herein could only be due to the negligence of plaintiff in error by and through its vice-principals in the mine.

On the other hand the order of Wilson would have done no harm had the gas not been present, and taken alone, without the presence of gas, it was not negligence to order Fulton into the roadway and such order would have caused him no harm.

In this connection we would like to draw the attention of the court to portions of the testimony of Pierard and Wilson showing their knowledge of the presence of gas in the west roadway and of its dangerous extent, and of their utter disregard of their duty to clear it out.

Pierard said (Rec., 34):

> "The fan that was operated for the purpose of clearing gas out of the mine was at the bottom of the shaft, I passed right beside it to get at the bottom of the mine, it was not then in operation. *I did not start it nor try to start it.* I knew at the time there was gas in the mine in that section, always had some in it. I didn't know that Fulton and Schmitz were going into the section, into the west. *I knew they were coming down into the mine to lay switches somewhere. I didn't make any effort to get the gas out.*"

On page 39 of the record he said:

"Q. Did you ever find gas in there?

A. Yes, sir.

Q. Did you know that gas was in the habit of communicating (accumulating) here?

A. Yes, sir.

Q. Did you know it would be there unless it was taken out?

A. Yes, sir."

On page 45 of the record, speaking of his usual habits, he said:

"I started the fan in the morning about half past four or five o'clock before the fan was started, sometimes we were driving on the road, sometimes timbering. Before the men came down I went in to test the west entry; to examine the mine. There was no gas anywhere *except in the west entry. There had been gas in there a long while, four or five months; three or four months.* I never made a test to see exactly how long it took the fan to clear out. I generally went in with a safety lamp, always at six o'clock or a little after."

Wilson testified (Abst., 64):

"We found gas in the west roadway about 50 or 60 feet from the bottom of the shaft; then we found gas there right along from that time up to the time of the accident and after. We started to find the gas about 50 or 60 feet from the bottom of the shaft and there was gas constantly all the time right along after that."

On page 70 he said:

"On that Sunday morning from past experience I knew that there was gas in the west roadway; I knew that was why the fan was put in; we all knew that. *I knew those men were going there to work and were expecting to start in at seven o'clock in the morning.* I didn't get there quite at seven. *I permitted those men to go into the mine knowing there was gas in the west roadway.*"

The foregoing excerpts from the testimony show knowledge on the part of plaintiff in error of the dangerous conditions in the mine by and through its vice principals and the proximate cause of Fulton's death was the failure to remove the dangerous agency or to obviate and lessen the danger and give due and proper warning by one of the methods provided for by statute as averred in the various counts of the declaration (Rec., 5-16-19-22-23-24).

V.

CONTRIBUTORY NEGLIGENCE ON THE PART OF FULTON WOULD NOT DEFEAT THE RIGHT OF DEFENDANT IN ERROR TO RECOVER IN THIS CASE.

The Supreme Court of Illinois has uniformly held that contributory negligence on the part of a workman injured in a coal mine would not defeat his right to recover from the mine owner for injuries sustained by him as a consequence of any act or omission on the part of the owner, operator or manager of the mine in willful disregard of the statute; in other words a violation of the Act consciously or knowingly committed or acquiesced in. Under "Point V" we have cited many cases decided by our Supreme Court holding this doctrine in the clearest and strongest terms. For convenience we repeat the language used by the Illinois Supreme Court in *Carterville Coal Co.* v. *Abbott*, 181 Ill., 495, 502, 503, where the court said:

> "*Mere contributory negligence on the part of a miner will not defeat a right of recovery* where he is injured by the willful disregard of the statute, either by an act of omission or commission, on the

> part of the owner, operator or manager. To hold that the same principle as to contributory negligence should be applied in case of one who is injured in a mine because the owner, operator or manager totally disregarded the statute, as in other cases of negligence, *is to totally disregard the provisions of the constitution, which are mandatory in requiring the enactment of this character of legislation, and would destroy the effect of the statute* and in no manner regard the duty of protecting the life and safety of miners."

The court will note that the decisions of the Illinois Supreme Court are in conformity with the spirit of the constitution and legislation of this state and express forcibly the importance given to this class of legislation in this state and the solicitude with which the highest courts of the state seek to effectuate the evident policy of the law makers. Under the decisions of the Illinois Supreme Court above referred to contributory negligence on the part of Fulton would not defeat the right of defendant in error to recover herein, but it is urged by counsel for plaintiff in error that he was guilty of more than contributory negligence and that his acts amounted to a willful disregard of the statute. The evidence does not by any means support our opponents' theory in this regard.

Schmitz testified (Rec., 53):

> "I received instructions from the mine manager, Wilson, at the bottom of the shaft that morning. I went down *straight south* close to the fire boxes and *Wilson hollered after me and told me to go and help Sam Fulton; help push that car on the west road and help Sam Fulton lay the switch.* * * * When I started to help Fulton push the car Mr. Wilson, the mine manager was close by the little engine that ran the fan. * * * When Fulton and I started to push the car away Wilson

was close up to the little engine; *right close to me when we pushed the car.* * * * *I had to push Wilson back with my hand so as—rails would not touch Mr. Wilson.*

* * * * *

(Rec., 55.) When I went straight south I left the boss and Sam at the bottom of the shaft, that is Wilson and Fulton. I went straight south to Pierard and *it was about ten minutes after that when Wilson called to me.* * * * *He told me to help Sam, nothing more.*

(Rec., 56.) Q. What did Wilson say to Fulton?

A. *Boss no tell to wait, he told to go.*

Q. What statement, if any, was made to Fulton by Wilson?

A. *Just tell me to go; that all.*"

The above testimony is quoted to show that *Wilson knew* positively that Fulton and Schmitz were going into the west entry immediately, although he admitted that he knew it was full of gas.

On record p. 70, Wilson, the mine manager, said:

"On that Sunday morning from past experience *I knew that there was gas in the west roadway.* I knew that was why the fan was put in; we all knew that. *I knew those men were going there to work and were expected to start in at seven o'clock in the morning.* I didn't get there quite at seven. I PERMITTED *those men to go into the mine knowing there was gas in the west roadway.*"

Pierard, the mine examiner testified (Rec., 34):

"I knew at the time there was gas in the mine in that section; always had some in it. I didn't know that Fulton and Schmitz were going into the section into the west. *I knew they were coming down into the mine to lay switches somewhere. I didn't make any effort to get the gas out.*"

He further testified (Rec., 35):

"After the fan was started I walked in the south room, Schmitz and Capet walked in with me. I saw Wilson walking in the end of the south road. * * * Schmitz came right up where I was and stayed there two or three minutes and then he went back to the bottom.

(Rec., 36 and 37.) Q. What did you hear Wilson say to Schmitz when he hollered at him?

A. He said, '*You will work with Fulton today,*' something to that effect; something like that, I could not say exactly now.

(Rec., 38.) I could not say about what time it was in the morning that I went down in the mine; about seven o'clock. * * * I couldn't say how near to eight o'clock it was that morning before the fan started. My best recollection and judgment as to the time is that I don't think it would exceed much after half past seven; around thirty-five minutes.

(Rec., 39.) Q. Did you ever find gas in there?

A. Yes, sir.

Q. Did you know that gas was in the habit of communicating (accumulating) here?

A. Yes, sir.

Q. Did you know it would be there unless it was taken out?

A. Yes, sir."

Moses Capet testified (Rec., 84):

"When Wilson came in he hold that 2x4 piece while I cut it. *He hollered to Schmit.* I don't know what he said to Schmit; *told him to help Sam Fulton.* When he hollered to him Schmit was about 25 feet further south in the south roadway with Ed Pierard and when Wilson called him, Schmit passed by us and went to the bottom. Wilson stayed there with him; I don't know for sure whether he go to the bottom or not. When Wilson called to Schmit, *Schmit was working with Ed Pierard.* After Wilson called him, Schmidt go to the bottom.

Q. What did Wilson do?

A. That is before Wilson came to me, that is before when he called Paul Schmidt.

Q. Where was Wilson when he called Schmidt?

A. *He is there on the bottom and he come after Schmidt go past there;* understand?

Q. Well, I don't quite understand, no.

A. He hollered Paul Schmidt to come. Paul come by me.

Q. Who was on the bottom?

A. Wilson.

Q. *Wilson was on the bottom.*

A. And Sam Fulton. And then he called Schmidt?

A. Called to Schmidt there before he came to me, before Wilson came with me. * * *

Q. Now after he called to Schmitz, Schmitz came out?

A. Yes, sir.

Q. What did Wilson do when Schmitz came out?

A. Well, may be he talk with him what he had to do. I don't know what he said. Wilson then came with me to help me. * * *

Q. How soon did he come in to help you?

A. Oh, may be a few minutes after.

Q. What did he do?

A. He held some 2x4 and cut it because it swung all over you along on top of the boxes. He stayed there with me fixing the boxes maybe five or six minutes and then the explosion came and knocked me down and put out our lights."

Wilson testified (Rec., 66):

"When I got into the south road I told Smith that he had to help Fulton to-day. Smith was in the south road further south than where I was. * * * I should think I remained in the south entry from five to six minutes. Of course I can't tell to a minute or two either way, but I should judge it would be in the neighborhood of five or six minutes. When I called to Schmitz to help

Fulton, *Schmitz came out and walked past me right to the bottom.* I didn't see him after that. My back was toward the bottom."

On record, 73, Wilson testified:

"*I told Schmitz he was to help Fulton.* I think that is the words I used, as near as I can remember; that he was to work with Fulton or help Fulton. * * * Schmitz said, 'All right,' and came out. He passed me where I was. *I had no conversation with Schmitz except that.*"

Of course Wilson denied that he directed Fulton and Schmitz to go immediately into the west entry, but said that he told Fulton to wait until the west entry was clear of gas. He admits, however, that he gave no such instruction to Schmitz. He also testified that he told Fulton that he would go into the west entry with a safety lamp, but the record shows he did nothing of the kind. (Rec., 66.) There was in this case, as in every other case of a similar nature a direct conflict in the testimony on some essential points, but as the record stands, Wilson is directly contradicted by Schmitz, who says that Wilson told them not to wait, but to go, and the physical facts and circumstances testified to tend to bear out the testimony of Schmitz.

Wilson said that he told Fulton to wait until the gas was cleared out, but at the same time admits he called Schmitz *from his work in the south entry* and instructed him to assist Fulton. It is not reasonable to suppose that he would call Schmitz from his work for the purpose of having him *sit idly* at the bottom of the shaft waiting for the gas to clear out and the jury evidently did not consider his testimony in this regard as credible. The testimony of all the witnesses as to the manner in which Wilson called Schmitz and the posi-

tion occupied by the men at the time is perfectly consistent. It will be noted that Capet especially testifies that when Wilson called Schmitz he was at the bottom of the mine and remained there with Fulton and Schmitz for some few minutes before going into the south entry. Just what his conversation was during those few minutes no one but himself and Schmitz have been able to tell and the account given by Schmitz contradicts Wilson's account in every material point, but the record shows that Wilson was in the south entry, but a very few minutes after leaving Fulton and Schmitz before the explosion occurred. Capet says that it was about five or six minutes after Wilson returned to assist him that the explosion occurred. *This was just about sufficient time to allow Fulton and Schmitz to reach the point in the west entry, where the explosion occurred with their carload of tools and material. Therefore it is reasonable to assume that these men departed into the west entry at about the same time that Wilson started to go into the south entry, and this bears out the testimony of Schmitz that he told them not to wait, but to go ahead into the roadway and also the testimony of Capet that Wilson, after calling Schmitz, remained at the foot of the mine with him and Fulton until just about the time when they must necessarily have started for their destination.* There can be little doubt that the jury who heard the testimony of the witnesses and saw them, thus construed their evidence.

There is nothing in the record that justifies the theory that Fulton willfully violated the statute or even that his act in going into the mine was necessarily contributory negligence in the face of the evidence as

to the direct command of Wilson, the officer in authority there, to go into the mine and not to wait. It is never presumed that a man will knowingly incur physical pain or death when he can avoid it (see Point V). And in the case of *Pawnee Coal Co.* v. *Royce,* 184 Ill., 402-15, the court says:

> "The law goes further, and provides that 'no person *shall be allowed to enter the mine* until such examiner shall have reported all of the conditions safe for beginning work.' The report itself did not state that all of the conditions were safe for beginning work, and taking the evidence for the plaintiff as true, as we must for the purposes of this discussion, the appellant had actual notice of the unsafe condition of this entry. Nor does it make any difference that plaintiff did not look for the record, under the facts of this case. Whether he relied on the statute or on the promise of the appellant to repair, *he had the right to assume that the appellant would keep its promise, and he also had the right to assume that it would comply with the statutory requirement, and was not bound to ascertain each morning whether it was doing so.*"

We believe that Fulton when he went into the west entry of the mine assumed, as the authorities hold he had the right to assume, that the mine was safe for him to work in and no other theory is reasonable—in fact if he had gone into the mine willfully, knowing the existence and extent of the danger therein, as plaintiff in error would have the court believe, it would have amounted to a suicidal intent upon his part *and on the part of Schmitz,* who evidently went into the mine from the same motive that inspired Fulton, whatever that motive was.

However this may be, it has been held in a long line

of decisions and we believe without exception to the rule, that whether or not an act of negligence amounts to willfulness or wantonness *is always a question of fact to be determined by the jury.* We maintain that in this case the verdict of the jury under the very full and clear instructions of the court as set forth on record page 97 is conclusive of this question.

VI.

THE JURY WERE FULLY INSTRUCTED AS TO THE EFFECT OF A WILLFUL VIOLATION OF THE MINING ACT BY FULTON. (Rec., 97-98.)

Counsel for plaintiff in error complain of the refusal of two instructions offered by them and found on page 107 of the record. The first instruction is to the effect that if the jury believe that Sam Fulton at the time he was killed was engaged in a willful act which endangered the lives or health of persons working in the mine with him and the security of the mine or its machinery and that such willful act contributed to his death, then the plaintiff cannot recover in this cause.

The court undoubtedly refused this instruction for the reason that there is absolutely no evidence in the record to the effect that Fulton was engaged in such a willful act as that described in the instruction, and the instruction as framed is so very misleading that without explanation it would not convey to the jury what character of willful act was referred to.

The instruction as offered fails to state that the willful act referred to therein must be an act in violation

of the statute and if it had been given to the jury as offered it would certainly have been very difficult for them to have decided just what kind of a willful act was meant. Unless the act referred to was in violation of the statute and was done consciously and knowingly it would not come within the definition of the word "willful" as used in the statute and in the decisions of the court construing the statute. As offered the instruction might be construed to include acts which would constitute nothing more than mere contributory negligence and that would not have defeated the right of defendant in error to recover. The court gave to the jury a much better instruction, which is found on pages 97 and 98 of the record, and which covers the ground intended to be covered by the refused instruction, and the instruction as given by the court is as favorable to the contention of plaintiff in error as could possibly be expected.

The second instruction, the refusal of which is complained of is clearly repugnant to the decisions of the Supreme Court of Illinois holding that contributory negligence is no defense to an action of the nature of this one and the instruction offered is simply framed on the theory that negligence, if any, on the part of Fulton would defeat the right of defendant in error to recover herein. Under other headings we have discussed the facts and circumstances leading up to and culminating in Fulton's death, and have also presented to the court the law of Illinois in relation to contributory negligence and do not care to burden the court at this time with mere repetition of those matters already fully discussed. We believe the court will find from a perusal of the instructions given to the

jury by the trial court that the law relating to this case was very fully and fairly presented and that plaintiff in error has no ground for complaint in that regard.

VII.

ALL THE COUNTS OF THE DECLARATION WERE SUPPORTED BY EVIDENCE AND THE ISSUES WERE PROPERLY LEFT TO THE JURY, AND IF THE EVIDENCE SUPPORTED ONE GOOD COUNT OF THE DECLARATION, THAT WOULD BE SUFFICIENT TO SUSTAIN THE ACTION.

Plaintiff in error complains that the evidence did not support the second, third, fifth and sixth counts of the declaration. In this connection we respectfully refer the court to Point I, under which is cited the section of the statute of Illinois and the Illinois authorities to the effect that whenever an entire verdict is given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts be sufficient to sustain the verdict. Several distinct violations of the statute were alleged and proved in the case and under the law this was surely sufficient to sustain the verdict of the jury. As to the second and third counts alleging failure to provide cross-cuts and stoppings in the mine, Pierard testified that there were no cross-cuts for the reason that it was a long wall mine, and there being no cross-cuts, there were necessarily, no stoppings. This evidence went to the jury simply for what it was worth and this phase of the case certainly did plaintiff in error no harm and had no tendency to confuse the jury. Several violations of the statute were actually proved

so clearly and strikingly as to give the jury ample foundation for finding the verdict against plaintiff in error, without regard to the negligence alleged in the second and third counts. The court in its instructions (Rec., 94-5-6) discussed the various counts of the declaration to the jury and instructed them as follows (Rec., 96):

> "If you believe from the evidence that any of the counts in that declaration are sustained by the preponderance of the evidence, then it is your duty under the further instructions of the court to find for the plaintiff."
>
> "If you believe from the evidence that all the counts have not been sustained; if you believe, that is, that none of the counts have been sustained by the evidence, you shall, under the further instructions of the court, find for the defendant."

The court thus instructed the jury on the theory that we have contended for and under the law it made no difference whether or not the evidence fully sustained the counts referred to or not as long as other counts of the declaration were sufficiently supported.

As to the fifth count of the declaration we have heretofore cited sufficient of the testimony to show that there was ample evidence to the effect that plaintiff in error failed in its duty to refuse to allow Fulton to enter the mine except under the direction of the mine manager until all the conditions were made safe. There is no dispute but what the conditions were very unsafe and it is also admitted that as far as his entry into the west roadway was concerned, he was not accompanied by the mine manager, but on the contrary Wilson, after ordering him into the roadway left him to his fate and went himself into the south entry. This we maintain

is in direct violation of the meaning and the spirit of the act and the fact that Fulton was in the mine, under *the general supervision of the mine manager* has no bearing on this question. The act evidently intended that when the conditions in the mine were unsafe the men should only work there under *the special and personal direction* of the mine manager; he in contemplation of the law was supposed to be a competent judge of the risk and hazards assumed by those compelled to work in the dangerous places. It certainly did not mean such direction as Wilson could give to Fulton while he was in the south roadway and Fulton was in the west roadway some 150 feet away from him with a thick wall of coal between them. The evidence heretofore cited will show to the court that the jury had sufficient foundation for finding that plaintiff in error was guilty of a violation of the statute as charged in the fifth count of the declaration.

The sixth count of the declaration was also amply supported by evidence. It is based on the failure of plaintiff in error to watch over the ventilating apparatus and air currents in the mine, and in case of accident to fan or machinery by which the currents are obstructed or stopped, to at once order the withdrawal of the men and prohibit their return until thorough ventilation has been re-established. We take it that the only reasonable construction of this section of the statute is that in case the machinery is found to be out of order at any time so as to in any way imperil the lives or health of the men employed in the mine, it is the duty of the owner and his representatives to order their withdrawal and prohibit their return until

ventilation has been re-established. *It does not necessarily refer to a sudden accident by which the fan or machinery is rendered defective.* It is not the cause that is evidently considered as vital by the act, but the effect—in other words the danger to the men at work there. Any defect whether of long standing or caused suddenly, if it produces a dangerous result, as soon as discovered the statute imposes on the mine owner the duty of providing for the safety of the men employed in the mine.

Pierard testified (Rec., 34) there was a valve at the pump. The valve was all right *with the exception of the wheel. There never was a wheel on there. There was a place to put a wheel.* Mr. Wilson put the valve on. *There was no wheel to it.* It was started with a wrench. *If you wanted to tighten it up you tightened it with a wrench.* * * * (Rec., 35.)

> "I don't know how it was opened up that morning at that particular valve. I think Mr. Wilson opened it up. I could not say I saw him. I think he got that wrench on top." * * *

Schmitz testified (Rec., 54):

> "I was at the bottom and Wilson and Fulton came down. I waited until Mr. Wilson turned on the steam. He couldn't do it. *The valve was broken.* He went up on top to get a monkey wrench, turned the steam on a little engine which turns the fan. *The valve was broken. They used a wrench."*

Wilson testified (Rec., 70, 71):

> "Q. How long before that Sunday morning did you know that the wheel, that part of the valve was off the fan?
>
> A. *There never was no wheel on the fan until*

the time I put it on. There was a stem there; there had been a wheel on at one time.

Q. What happened to that wheel?

A. *I never seen it.*

Q. Did you make any effort to secure a wheel to put on that valve?

A. *No, I didn't think it was necessary.*"

On page 72, speaking of the monkey wrench which was used as a substitute for the wheel which should have been on the valve, Wilson said:

"I left this thing there and I think it was shaken off in the morning when I got there. It was a monkey wrench. *Then I had to go up on top and find another* and when I found the other and came down I was able to turn the valve and let the steam out."

Under the circumstances as shown by the evidence in this case the absence of the wheel from the valve of the engine was very important as *it delayed the starting of the machinery* until all the men were assembled at the bottom of the shaft and Fulton was ready to go into the west entry. If the wheel had been in place the machinery could have been started earlier and have given the fan a greater chance to dislodge the gas which had accumulated in this roadway. Taken in connection with the other evidence in the case it was certainly not error to submit this question to the jury and as there were other counts in the declaration not subject to the objections raised by plaintiff in error it seems immaterial whether or not this count standing alone would have been sufficient to predicate the case upon.

We do not agree with counsel for plaintiff in error that the Mining Act should be construed strictly and

this view has certainly never been entertained by the courts of Illinois which have taken great pains, as the court will observe from the citations herein contained, to construe the act liberally to effectuate its purposes and to carry out the intention of the Legislature. The evident spirit and purpose of the Act is such as to render a liberal construction of this Act essential or otherwise in many cases the real intention of the law makers would be defeated.

CONCLUSION.

We have only discussed those points in the case which we believe will be presented and argued by our opponents. Other points might be raised, but we believe that all the essential points have been discussed. In conclusion we desire to draw the attention of the court to the testimony of Minnie Fulton (Rec., 49). She testified that when her husband was killed they had five children, *the oldest being eleven years old, and the youngest about fourteen months old.* She testified that Fulton, at the time he was killed, was earning about $2.25 per day and had for a long time before that been earning the wages referred to; that he always worked steadily and supported his wife and family and that he brought his money home to her and that she used it in defraying the family expenses. Fulton at the time of his death *was thirty-six years old.* The verdict of the jury was for $4,000.

Evidence was introduced on behalf of defendant in error to show that the coal mine in question was actually being operated. (Rec., 50, 57, 59.) This evidence

was simply for the purpose of proving that the mine in question came within the definition of the word as used in the statute.

Plaintiff in error introduced several witnesses who attempted to prove knowledge on the part of Fulton of the dangerous conditions in the mine, but under the decisions of the courts it seems unnecessary to discuss that evidence, as we do not deem it pertinent to the issues in this case.

Fulton was killed on January 27, 1901, and therefore for nearly six years defendant in error and the little ones dependent upon her have waited for a final decision of this case hoping to receive the means of support and sustenance contemplated by the statute. By the persistent efforts of plaintiff in error, however, their hope has been deferred, and we respectfully submit that the judgment in this case should be speedily affirmed.

Respectfully submitted,

ARTHUR J. EDDY,
P. C. HALEY,
E. C. WETTEN,
Attorneys for Defendant in Error.

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No. 139

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

WILMINGTON STAR MINING COMPANY, *Plaintiff in Error,* *vs.* **MINNIE FULTON,** *Defendant in Error.*	In Error to the Circuit Court of the United States, for the Northern District of Illinois.

PETITION FOR REHEARING.

ARTHUR J. EDDY,
P. C. HALEY,
E. C. WETTEN,
Attorneys for Defendant in Error.

GUNTHORP-WARREN PRINTING CO., CHICAGO

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PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

We respectfully pray the court to reconsider its decision in this cause in so far as it holds that the trial court committed reversible error in overruling the motions of plaintiff in error to strike out the second, third and sixth counts of the declaration and in refusing to instruct the jury that no recovery could be had under any of these counts.

It is the common practice of the courts of Illinois under like circumstances to deny such motions and to

refuse similar instructions requested in cases tried in our courts, and the Supreme Court of Illinois has uniformly held that such action of the trial court was not error, if there was one good count in the declaration upon which the verdict of the jury might be predicated.

Under point 1 of our original brief (page 7) we cited Section 57 of the Illinois Practice Act, Chap. 110, Rev. Statutes, which provides that:

> "Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count if one or more of the counts in the declaration be sufficient to sustain the verdict."

Under point 3 (original brief, page 17) we cited authorities to the effect that the decisions of the highest court of a state construing a statute of such state are conclusive and as binding as the text of the law. Under point 1 (original brief, page 8) we drew the attention of the court to Section 114, U. S. Compiled Statutes, title, "The Judiciary," which provides in substance that the federal courts shall conform to the practice of the state courts in cases other than equity and admiralty cases.

We respectfully direct the attention of the court to the following cases decided by the Supreme Court of Illinois which we believe fully support our contention that the trial court did not commit reversible error in refusing to instruct the jury to disregard the second, third and sixth counts of the declaration herein. These cases hold that it makes no difference whether the counts complained of were so defective as to be incapable of proof or whether the evidence simply failed

to support the allegations contained in certain good counts. *If there are one or more good counts which were sufficiently proved, that is enough to support the verdict.*

In the very recent case of *C. W. & V. Coal Co.* v. *Moran,* 210 Ill., 9, 16, the declaration consisted of five counts. On page 16 the court says:

> "There were instructions offered by the defendant and refused, severally applicable to each count, and stating that the plaintiff could not recover under such count, and they were all refused. *There was no evidence tending to sustain the fourth and fifth counts,* but the first three counts each stated a good cause of action, and there was evidence tending to sustain them. The court might properly have given the instructions relating to the fourth and fifth counts, but *inasmuch as the first three counts each stated a cause of action and the evidence was applicable to them, the refusal of the instructions as to the fourth and fifth is not ground for reversal.*"

In the case of *B. & O. S. W. Ry. Co.* v. *Keck,* 185 Ill., 400-402, the declaration consisted of six counts. The plea of general issue was filed and at the close of the evidence the defendant presented to the court six instructions, one directed to each count, instructing the jury to disregard it. These instructions were refused and the refusal is assigned as error. On page 402 the court says:

> "It is said the instruction directed to the first count should have been given because that count fails to allege in what respect defendant was negligent, and that the second, fourth and fifth should have been given because the counts to which they were directed fail to disclose any right in the plaintiff to use the crossing. *Error in refusing to*

instruct a jury to disregard certain counts in a declaration is harmless where there is one good count in the declaration to which the evidence is applicable and which is sufficient to sustain the judgment. Conceding these counts were subject to the criticisms urged, the fifth count, which was good and to which no objection is made, *will sustain the judgment. (Chicago and Alton Railroad Co.* v. *Anderson,* 166 Ill., 572; *Consolidated Coal Co.* v. *Scheiber,* 167 id., 539; *Illinois Central Railroad Co.* v. *Weiland,* 179 id., 609.)"

In the case of *Swift & Co.* v. *Rutkowski,* 182 Ill., 18-22-23-24, the declaration consisted of five counts and a motion was made by defendant to exclude from the consideration of the jury three of these counts on the ground of variance between the declaration and the evidence, which motion the court overruled. Beginning on page 22, the Supreme Court says:

"Moreover, *the plaintiff did not rely exclusively on the counts objected to,* but relied on other counts of the declaration under which it is not pretended the evidence was inadmissible. If the evidence was admissible under any one count of the declaration it could not be excluded. The rule laid down in *Chicago, Burlington and Quincy Railroad Co.* v. *Warner,* 108 Ill., 538, applies here. It is there said (p. 548): 'It is also contended the plaintiff failed to prove his case as laid in the declaration, and that the court therefore erred in not excluding the evidence from the jury. We do not concur in this view. The *mistake* of appellant on this branch of the case is in assuming that appellee bases his right of recovery exclusively upon "the original improper construction of the car." It is true the declaration proceeds upon this theory, *but not upon this theory alone,* for, as already shown. it is expressly averred in the amended declaration that it was the duty of the defendant "to furnish for the use of its employes

properly and carefully constructed cars, with end ladders, side handles and steps attached thereto," and the declaration further on expressly negatives the performance of this duty. *This being so, the plaintiff was not bound, at his peril, to prove both branches of his case. It was sufficient if he proved either.* It is familiar doctrine of the law that all torts are severable, and, therefore, *in an action ex delicto, it is immaterial that all the averments of the declaration are not proved as laid. It is sufficient if such of them as are so proved show a good cause of action.'* * * *

It is also claimed that the court erred in refusing to instruct the jury to disregard the second additional count of the declaration, filed January 28, 1896, and the second and fourth additional counts filed July 15, 1897. It is conceded that the declaration contains one or two counts which are good and to which the evidence is applicable, and that these counts, or one of them, are sufficient to sustain the judgment. *Where such is the case, it was expressly held in Consolidated Coal Co. of St. Louis* v. *Scheiber*, 167 Ill., 539, *that the refusal of the court to instruct the jury is not reversible error.* The same rule was declared in *Chicago and Alton Railroad Co.* v. *Anderson*, 166 Ill., 575, and the rule established in those cases must control here."

In the case of *C. & A. R. R. Co.* v. *Harbur*, 180 Ill., 394-396, the declaration consisted of three counts. At the close of the evidence motions were made to instruct the jury to find for the defendant and also a motion in arrest of judgment. The court finds that there was *no evidence* introduced tending either to prove or disprove certain allegations in the declaration, but the court says on page 396:

"The common law rule is changed by statute providing that where an entire verdict shall be given on several counts the same shall not be set

> aside or reversed on account of any defective count if one or more of the counts in the declaration are sufficient to sustain a verdict. *Shreffler* v. *Nadelhoffer*, 133 Ill., 536."

In the case of *I. C. R. R. Co.* v. *Weiland*, 179 Ill., pages 609, 614, the declaration contained six counts and it was contended that the evidence was insufficient to support certain of the counts. The court says, on page 614:

> "Instructions were asked by the defendant to the jury to disregard each of the counts in the declaration, and were refused. Appellant contends that in this the court erred, and especially as to some of the counts. As we have seen, the third, fourth and sixth counts *were sufficient*, and if it were held the instructions applicable to the first, second and fifth should have been given, *the error could not operate to reverse the judgment. Consolidated Coal Co.* v. *Scheiber*, 167 Ill., 539."

In the case of *Consolidated Coal Co.* v. *Scheiber*, 167 Ill., 539, the declaration contained six counts. To each of these counts the defendant requested an instruction to the jury to disregard the said counts. The court gave the instruction applicable to the sixth count, *but refused to give those referring to the first five counts.* It is contended that all the counts were faulty and that it was the duty of the court to instruct the jury to disregard them. The court in its opinion (p. 541) discusses the fourth and fifth counts and says:

> "From the view we take of the case *it is unnecessary to examine the other counts of the declaration, for if there is one good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts becomes harmless.* It could not

in reason be said that the defendant occupied any better position than it would had it filed a general demurrer to each count and refused to plead further; and it has been decided by this court, under the statute, that where a defendant abides by his general demurrer which has been overruled to each of several counts, and final judgment has been rendered for the damages as assessed, the judgment will not be reversed because the court erred in overruling the demurrer to some of the counts, *if one of the counts is good and the evidence upon which the damages were assessed is applicable to such good count.* (*North* v. *Kizer*, 72 Ill., 172. See, also, *Shreffler* v. *Nadelhoffer*, 133 Ill., 536; *Chicago and Eastern Illinois Railroad Co.* v. *Hines*, 132 id., 161; *Anderson* v. *Semple*, 2 Gilm., 455.)" * * * (p. 543.)

"The rule at common law was, that although there were good counts in the declaration, yet if there was one bad count the judgment would be arrested. But that rule applied only where such bad count was insufficient to support the judgment, and not where it would have been held merely defective in stating the cause of action. Our statute has so far changed that rule that *where there is an entire verdict on several counts it shall not be set aside or reversed because the declaration contains a defective count, if there be one or more counts sufficient to sustain the verdict.*"

In the case of *C. & A. R. R. Co.* v. *Anderson*, 166 Ill., 572, 575, the defendant asked instructions to the jury as to the first, second, third and fourth counts of the declaration, directing them to disregard such counts and the court refused to give such instruction. The Supreme Court says (page 575):

"The first, second, third and fourth instructions in substance directed the jury to disregard the first, second, third and fourth counts of the decla-

ration. Section 51 of the Practice Act provides, that if one or more of the counts of a declaration are faulty, the defendant may apply to the court to instruct the jury to disregard such faulty counts. We are not prepared to hold that the counts are so insufficient as not to support the judgment, and if they are not sufficient, the defects could not be reached by the instruction. *But if the counts were so defective that they would not support the judgment, the error in refusing the instructions, if error it was, was harmless as the declaration contained five counts, and it is not claimed that the fifth count is insufficient.* If there is *one* good count to which the evidence was applicable and which is sufficient to sustain the judgment, the error of the court, if any, in refusing to instruct the jury to disregard the other counts, *becomes harmless.*"

In the case of *Illinois Steel Co.* v. *Schymanowski*, 162 Ill., pp. 447, 457-458, the declaration consisted of three counts. The defendant requested an instruction to the jury requiring them to find for the defendant upon the first count of the declaration. The court instructed the jury that there was no evidence of certain allegations contained in the count to the effect that defendant promised to furnish an additional light and did not perform its promise, and it was then contended by defendant that what remained of the count did not state a legal cause of action. The Supreme Court says:

"Even if this were so, the second and third counts each disclose a legal cause of action, and both are sufficient to sustain the judgment. The verdict is an entire one, not limited to the first count. This being so, Section 57 of the Practice Act is applicable, which provides, that 'Whenever an entire verdict shall be given on several counts, the same shall not be set aside or reversed on the ground of any defective count, if one or more of

the counts in the declaration be sufficient to sustain the verdict.' (2 Starr & Curtis Stat., p. 1822.)

Counsel insist that, by the modified instruction, the jury were permitted to regard the remainder of the first count, after eliminating therefrom the allegation of a promise, as still being a part of the declaration, and that the promise and reliance thereon were so much a part of the first count as to make a recovery upon what was left of it impossible. In other words, it is insisted that the allegation as to the promise cannot be regarded as surplusage. We are unable to agree with this contention. The plaintiff may aver in his declaration as many grounds of recovery as he sees proper, *but it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case.* (*New York, Chicago and St. Louis Railroad Co.* v. *Blumenthal*, 160 Ill., 40.) Where a servant sued his master for a personal injury while engaged in service, and alleged two grounds of actionable negligence, namely, negligence in failing to remedy a defect in the floor of the shop where the plaintiff was employed, and negligence in failing to perform a promise to place guards over certain knives used in the shaping of materials, we said: 'The fact, * * * that plaintiff failed to prove that defendant promised * * * to remedy the defect of the machine in regard to guards over the knives, *did not preclude a recovery on the ground of other negligence relied upon and sustained by the evidence.*' (*Weber Wagon Co.* v. *Kehl*, 139 Ill., 644.) So in the case at bar, the first count charges negligence upon the ground that the defendant did not have and keep the sides of the pile of ore of such shape and so supported, that the ore would not fall down and injure the persons at work near the pile, and also upon the ground that defendant did not perform its promise to furnish more light to work by; but *the fact that plaintiff failed to prove the promise to furnish more light, does not preclude*

a recovery upon the other ground of negligence in failing to keep the sides of the pile of ore in a safe condition."

In the case of *N. Y. C. & St. L. R. R. Co.* v. *Blumenthal,* 160 Ill., 40-47, the declaration consisted of four counts. The defendant requested the court to instruct the jury that the evidence was insufficient to maintain the plaintiff's case as charged in the declaration, but the court held that the evidence sufficiently supported certain of the allegations of the declaration, and says. (p. 40.)

> "The plaintiff may aver in his declaration as many grounds of recovery as he sees proper, but *it is not necessary to prove all that is alleged. It is sufficient to prove enough of the negligence charged to make out a case.* (*Weber Wagon Co.* v. *Kehl,* 139 Ill., 644.)"

In the case of *Weber Wagon Co.* v. *Kehl,* 139 Ill., 646-657, the declaration consisted of two counts, one containing averments that the defendant had promised or agreed to place guards over certain knives of a machine called a shaper. The court says (p. 656):

> "On the trial, plaintiff introduced evidence tending to prove the allegations of the declaration, *except* the averment that the defendant promised or agreed to place guards over the knives of the shaper. *As to this averment no proof whatever was introduced,* and on account of a failure to introduce any proof upon this question the defendant claims no recovery can be had, and the court erred in refusing its first instruction, as follows: 'The court instructs the jury, that under the pleadings and proofs in this case the plaintiff is not entitled to recover, and you should find for the defendant.' *The plaintiff had the right to aver in his declaration as many grounds of recovery as he*

saw proper, but it was not necessary to prove all that was alleged. It was sufficient to prove enough of the negligence charged to make out a case.''

In the case of *Pennsylvania Company* v. *Backes,* 133 Ill., 255-259-260, the court says:

''The next error complained of is, that the plaintiff's first and third instructions allowed a recovery under any one of the four counts of the declaration, *three of which are believed to be inapplicable,* to the case as made by the evidence. The first count of the declaration charged the defendant with running the car which resulted in the injury, at a high and unlawful rate of speed, and with negligently driving the same against the plaintiff. The second charged the defendant with a violation of a section of our statute which requires the blowing of a whistle or ringing of a bell at a distance of eighty rods from highway crossings. The third charged a violation of the city ordinance in failing to ring a bell or blow a whistle The fourth charged that the coal car was running at a greater rate of speed than six miles an hour, contrary to the ordinances of the city.

The substance of the charge complained of is, that if the jury believe, from the evidence, that the plaintiff, without fault or negligence on his part, was injured by the wrongful acts of the defendant company, as alleged by the plaintiff in his declaration, then they should find the defendant guilty. *We shall not stop to inquire whether the second, third and fourth counts were sustained by the evidence introduced under them. Even if they were not, a recovery might be had under the first count.* The instruction complained of could not mislead the jury.

In *Hannibal and St. Joe Railroad Co.* v. *Martin,* 111 Ill., 219, where an instruction directed the jury, that if the plaintiff was injured in manner and form as alleged in the declaration, or some count thereof, the jury should find the defendant

guilty, it was there, as here, urged that the instruction was erroneous, because the court should not have submitted the question of plaintiff's right to recover under the third and fourth counts of the declaration, to the jury, because there was *no evidence* that the accident happened in the manner therein stated. The court held the instruction good, and said: 'It was the privilege of appellant to call the attention of the jury to the different allegations of the several counts, if it chose to do so; but it is sufficient if the law, as laid down at the instance of appellee, is correct, and applicable to the case under *either count.*'

It is not claimed that plaintiff could not recover under the *first count* of the declaration, if the jury found, from the evidence, the facts as stated in the charge. Nor is it claimed that the instruction is erroneous as to that count of the declaration, and under the ruling in the case cited, the instruction cannot be held to be erroneous. See, also, *Pennsylvania Co.* v. *Frana,* 112 Ill., 403."

In the case of *H. & St. J. R. R. Co.* v. *Martin,* 111 Ill., 220, the 6th section of the syllabus reads as follows:

"In an action by a passenger against a railroad company to recover for a personal injury, two counts of the declaration charged a liability for a failure to make up the train and sufficiently to couple its cars, while the other two charge the negligence to be the moving the engine and cars attached thereto without sufficiently and securely coupling the cars. Held, that proof of *either ground* was sufficient to authorize a recovery, and that an instruction embracing this principle was not erroneous."

In the case of *Johnston* v. *McNiff,* 113 Ill. App., pp. 1-3, the declaration consisted of seven counts and it was insisted that the sixth and seventh counts were faulty. The court says, p. 3:

"It is not questioned that the first five counts

were good, nor that the evidence was applicable thereto. The fifty-seventh section of the Practice Act provides that 'whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict.' *We deem it unnecessary to determine* whether or not said sixth and seventh counts were so faulty as to be sufficient to sustain a verdict, for even if they were, there being five good counts, and the instruction being general as to the whole declaration, was properly given. *Consolidated Coal Co.* v. *Scheiber,* 167 Ill., 539; *C. & A. R. R. Co.* v. *Anderson,* 166 Ill., 572; *H. & St. J. R. R. Co.* v. *Martin,* 111 Ill., 219; *Schreffler* v. *Nadelhoffer,* 133 Ill., 536; *Franklin Printing Co.* v. *Behrens,* 181 Ill., 340; *Pennsylvania Co.* v. *Backes,* 133 Ill., 255."

See, also:

Franklin Printing Co. v. *Behrens,* 181 Ill., 340.

Gebbie v. *Mooney,* 121 Ill., 255.

Chicago Union Traction Co. v. *Kallberg,* 107 Ill. App., 90, 92, 93.

St. L. & T. H. R. R. Co. v. *Eggman,* 60 Ill. App., 291-295.

East St. Louis Connecting Railway Co. v. *Shannon,* 52 Ill. App., 420-423.

We respectfully submit that in view of the foregoing authorities the trial court did not commit reversible error in refusing to instruct the jury to disregard the counts of the declaration complained of and in so refusing merely followed the usual and customary practice of this state. In this connection we desire to draw the attention of the court to the case of *Maryland* v. *Baldwin,* 112 U. S., 490, cited in the opinion of the

court in this case. In the first place that case was not an action in tort where, as the Supreme Court of Illinois has repeatedly held, the tort is severable and can be alleged in as many different forms and in as many different counts as the pleader chooses to set it forth, and that *it is never necessary to prove all the charges as laid.*

In the Maryland case five pleas were filed by the defendants; the first plea tendered an issue which if decided in favor of defendants *was conclusive of the case. Incompetent evidence was admitted bearing directly on this issue* and the verdict being general and in favor of defendants, the court could not determine whether or not this incompetent evidence had influenced the jury in finding for the defendants under the issue raised by the aforesaid plea.

In the case at bar *it is not claimed that improper evidence was introduced,* but simply that the evidence did not prove that certain violations of the statute charged in three of the counts tended proximately to cause the death of Fulton. Whether or not the second, third and sixth counts of the declaration were proved *is not a controlling factor in this case.* As long as there were admittedly five good counts under which competent and proper proof was made it is sufficient to sustain the action.

If this case is remanded to the trial court for another trial and the three counts complained of are dismissed from the declaration the result of the trial could be nothing less than a verdict in favor of defendant in error as every controlling question of law has been decided on the two appeals of this case and the third

trial would amount to nothing more than an assessment of damages which as assessed in this case are certainly not excessive.

The record shows that Samuel Fulton was killed on January 27th, 1901, leaving defendant in error, his widow, and a family of small children, and that the widow is without means and is suing in this case for loss of support suffered by herself and children as a consequence of the untimely death of her husband. If the final determination of this case is further delayed it will cause great hardship to her.

We respectfully pray the court to reconsider this case and the authorities herein cited.

Respectfully submitted,

ARTHUR J. EDDY,
P. C. HALEY.
E. C. WETTEN.

Supreme Court of the United States.

No. 139.—October Term, 1906.

Wilmington Star Mining Company, Plaintiff in Error, vs. Minnie Fulton. } In error to the Circuit Court of the United States for the Northern District of Illinois.

[March 4, 1907.]

Mr. Justice White delivered the opinion of the Court.

On January 27, 1901, Samuel Fulton, while working as a trackman and mine laborer in a mine operated by the Wilmington Star Mining Company in Grundy County, Illinois, was killed by an explosion of mine gas. Minnie Fulton, the widow, on behalf of herself and children, brought this action against the mining company in a court of the State of Illinois to recover damages for the death of her husband. Because of diversity of citizenship the case was removed to the Circuit Court of the United States for the Northern District of Illinois.

The counts of the petition upon which the cause was ultimately tried were eight in number, and in each was set out a specified act of negligence averred to have been the proximate cause of the accident and to have constituted willful failure to perform specified statutory duties. In count 1 it was alleged that the mining company failed to maintain in the mine currents of fresh air sufficient for the health and safety of Fulton. Count 2 charged the failure to maintain cross cuts in the mine at proper distances apart, to secure the best ventilation at the face of the working places. In count 3 the company was charged with having failed to build all necessary stoppings in a substantial manner to close cross cuts connecting the inlet and outlet air courses in the mine. In count 4 the negligence set up was the failure to have the place in the mine where Fulton was expected to pass and to work inspected before Fulton was permitted to enter the mine, to ascertain whether there were accumulations of gas therein. In count 5 it was charged that the mining company, with knowledge of the existence of an accumulation of dangerous gases in the mine and its unsafe condition when Fulton, in the course of his employment, entered the mine on the morning of his death, willfully failed and neglected to prevent Fulton from entering the mine to work therein before the dangerous gases had been removed and the conditions in the

mine rendered safe, said Fulton not being then and there under the direction of the mine manager. In count 6 it was charged that the mining company, on the morning of the accident, had knowledge that a valve attachment of a certain steam pipe used to conduct steam generated for the purpose of running a ventilating fan in the mine had become accidentally broken or lost, whereby the air currents in the mine became obstructed and stopped, and a large quantity of dangerous gas was permitted to accumulate in the mine at the place where Fulton was required to pass and to work. And it was further charged that, although having such knowledge, the mining company willfully failed and neglected to order the withdrawal of Fulton from the mine and prohibit his return thereto until thorough ventilation had been established. In count 7 the negligence charged was that the mining company permitted Fulton to enter the mine before the mine examiner had visited it and seen that the air current was traveling in proper course and in proper quantity, and before the accumulation of dangerous gas, then in the mine, had been broken up or removed therefrom. In count 8 it was charged that the mining company had knowledge that accumulations of gas existed in the mine, yet it willfully failed and neglected to place a conspicuous mark at the place in the mine where accumulations of gas existed as a notice to Fulton and other employes to keep out, whereby Fulton failed to receive the statutory notice and warning of the existence of accumulated gas, and did not know of the dangerous condition of the mine when he proceeded to work at and near the place in the mine where such dangerous accumulation of gas existed.

To these various counts the defendant plead the general issue. The case was twice tried by a jury. On the first trial, at the close of the evidence for the plaintiff, the jury was instructed to find for the defendant. This judgment was reversed by the Circuit Court of Appeals for the Seventh Circuit. (133 Fed. Rep. 193.) The second trial resulted in a verdict for the plaintiff and an entry of the judgment which is here assailed.

On the trial it was testified that the sinking of the shaft in the mine where Fulton met his death was commenced in the month of April or May, 1900. Fulton worked for several months at the mine before the accident, at first assisting in sinking the shaft. The mine is what is known as a long wall mine, in which, it was testified, cross cuts were not employed. Cross cuts are used in what is known as a room and pillar mine. In that class of mines parallel entries are run, and after proceeding a certain distance—usually sixty feet—a road is cut across, connecting the parallel entries to permit of a circulation of air. After going another sixty feet a new cross cut is made and the openings of the prior cross cut are stopped up, thus carrying the circulation of air to the new cross cut. The mine in

question was thus intended to be constructed. From the bottom of the main or hoisting shaft towards the north, south, east and west radiated four main headings or roadways, and it was contemplated to construct a circular road connecting the outer ends of these four main roads so as to cause a complete circulation of air around the mine and through the roadways. About three hundred feet to the eastward of the main shaft was situated an air or escapement shaft. At the time of the accident the roads radiating north, east and west had been completed, but the circular roadway had only been completed between the outer edges of the east and north roads. Gas usually made its presence known in the west roadway after going fifty or sixty feet from the bottom of the main shaft. For some time before the accident men were employed at or near the end of this road continuing the circular road towards the northeast, and Fulton performed the work of track laying. In consequence of the non-completion of the circular roadway and the absence of natural ventilation in the west roadway, a ventilating fan was used to force air through air boxes to the places where the men were working in that roadway, "so as to give them air and keep the gases out." Whilst there is some confusion in the description of the situation and operation of the ventilating fan we take it that it was as follows: The fan was situated at the bottom of the shaft and was operated by a small engine in close proximity to the fan. The steam to work this engine was carried down from the boilers above, the steam pipe passing down the main shaft to the fan engine at the bottom. To turn on the steam to this engine and set it in motion there was a valve controlled by a wheel. There was another valve by which the accumulation of condensed water could be let off so as to enable the apparatus to be reached by live steam. This valve was intended also to be moved by a wheel, but that appliance had not been put on, and, therefore, in order to turn the valve the use of a wrench was necessary. A wrench used for this purpose was kept near the fan.

The mine manager stopped the fan about four o'clock on Saturday afternoon. On the next day (Sunday) Fulton and the mine manager descended the shaft together. The fan had not started when they reached the bottom of the shaft. The mine manager attempted to start the fan, but could not find the wrench, and there was a delay of a minute or two while he went up the shaft and secured a wrench. When the fan was started the mine examiner and several other employes who had descended the mine just ahead of Fulton and the mine manager were with the latter in the immediate vicinity of the fan. At that time, as testified to by the mine manager, he believed there was gas in the west roadway. Soon after the starting of the fan Fulton and a helper proceeded along the west roadway with pit lamps—naked lights—on their caps, pushing a car

loaded with track material. In a few minutes the explosion occurred which caused the death of Fulton and seriously injured the helper. There was contradictory evidence as to the instructions given by the mine manager to Fulton at the time he started into the west roadway. One version was that Fulton was told to wait awhile, until an examination had been made by the mine manager with a safety lamp. Another version implied from the evidence was that Fulton, entirely of his own volition, proceeded to the place where he was injured; and still another hypothesis was that Fulton was directed to proceed with the work without any caution. At the time of the explosion the mine manager, mine examiner and others were in the south roadway.

After the entry of judgment the cause was brought direct to this court on the ground that a constitutional right was claimed in the court below and denied.

The errors assigned which have been argued at bar present for consideration the following questions:

First, the constitutionality of the Illinois mining act of 1899 upon which this action was founded.

Second, the correctness of instructions to the jury on the subject of the proximate cause of the accident in the event Fulton went into the west roadway by direction of the mine manager.

Third, the correctness of a refusal to instruct the jury to return a verdict for the defendant if they found that "Fulton, at the time he was killed, was engaged in a willful act which endangered the lives or health of persons working in the mine with him or the security of the mine or its machinery, and that such willful act on his part contributed to his death."

Fourth, the correctness of a refusal to instruct the jury that if the death of Fulton resulted in part from his reckless disregard of consequences in view of his own surroundings, the plaintiff could not recover.

Fifth, the correctness of the overruling of motions to strike out the second and third counts of the declaration, and of the refusal to instruct the jury that no recovery could be had on these counts, because no evidence had been introduced to support the same.

Sixth, the correctness of the refusal to give the following instructions:

"If you believe from the evidence that the decedent Fulton, just before the time of his death, entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration.

Seventh, the correctness of the overruling of a motion to strike out the fifth count of the declaration and in refusing to instruct the jury that no

recovery could be had under said count, because no basis existed in the evidence for the asserted liability.

Eighth, the correctness of the overruling of a motion to strike out the sixth count of the declaration and a request for an instruction that no evidence had been introduced of any neglect as to the fan or machinery whereby the air currents of the mine became obstructed and stopped.

Before considering these alleged errors, however, we must dispose of a motion to dismiss. It is urged that as the direct appeal to this court rests alone upon the assertion of the repugnancy of the Illinois mining act to the Constitution of the United States, and as the claim of repugnancy is alone based upon certain provisions of that act providing for licensing mine managers and examiners, defining their duties and compelling mine owners to employ only licensed managers and examiners, the writ of error should be dismissed, because there is ground broad enough to sustain the judgment wholly irrespective of the provisions of the Illinois act just referred to, which are asserted to be repugnant to the Constitution of the United States. This proposition is based upon the contention that the first count of the declaration charges a violation of duty imposed by the statute directly upon the mine owner, irrespective of the requirements of the statute as to licensed employes. But issue is taken on behalf of the plaintiff in error in respect to the correctness of this contention, and it is insisted that the first count is open to the same objections which are urged against the others. We think the motion to dismiss is without merit, because there is color for the contention as to the unconstitutionality of the statute, as well in respect to the first as to the other counts of the declaration.

We come, then, to consider the first assigned error, viz., the constitutionality of the Illinois mining act approved April 18, 1899, in force July 1, 1899, entitled "An act to revise the laws in relation to coal mines and subjects relating thereto, and providing for the health and safety of persons employed therein." (Chap. 93, Rev. Stat. of Illinois.)

It is conceded that the statute in question has been authoritatively interpreted by the Supreme Court of Illinois as imposing upon mine owners responsibility for the defaults of mine managers and mine examiners, employes who are required by the statute to be selected by the mine owners from those holding licenses issued by the State mining board created by the statute. And it is an alleged incompatibility between such responsibility of the mine owner and the obligation imposed upon the mine owner to employ only persons licensed by the State, and the nature and character of the duties which the statute imposes upon them, upon which is based the asserted repugnancy of the statute to the Fourteenth Amendment.

Section 29 of article 4 of the Illinois constitution of 1870 is as follows:

"It shall be the duty of the general assembly to pass such laws as may be necessary for the protection of operative miners by providing for ventilation when the same may be required and the construction of escapement shafts, with such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishments as may be deemed proper."

In carrying out this constitutional requirement the general assembly of Illinois has from time to time legislated for the protection of miners. The act of 1899, here assailed as repugnant to the Constitution of the United States, as said by the Court of Appeals for the Seventh Circuit, (133 Fed. Rep. 197,) grew out of the desire "that every precaution should be taken against the unusual hazards and dangers incident to the inhabitancy of mines. It was intended, and intended rightly, to protect with all known expedients every person whose occupation required him to labor in these subterranean rooms and roadways."

The act is lengthy, covering 47 pages of print in the appendix to one of the briefs. In substance it created a State mining board, authorized that body to examine candidates for the position of State inspector of mines and to certify the names of the successful candidates to the governor, in whom was vested the power of appointment. Moreover, the statute fixed the qualifications of mine managers, hoisting engineers and mine examiners; required candidates for such positions to be examined by the State board and certificates to be furnished to those found competent, and made it unlawful in the operation of a coal mine to employ or suffer any person, other than one possessing the proper certificate, to serve as a mine manager, hoisting engineer or mine examiner. Section 16 prescribed in detail the duties of mine managers and miners; section 17 set forth the duties of hoisting engineers; and by section 18 the duties of mine examiners are prescribed. Interspersed, however, throughout the remainder of the act are found in sections relating to the subject of ventilation, powder and blast, place of refuge, etc., requirements to be observed in effect supplementing the sections prescribing in detail the duties to be performed by the employes above mentioned. We think the omissions of duty charged in the various counts in the declaration are embraced in those in terms laid upon the mine manager or mine examiner. Considering this act, the Supreme Court of Illinois, in *Henrietta Coal Company* v. *Martin*, (22 Ill. 460,) first commented upon the decisions in *Durkin* v. *Kingston Coal Co.*, (171 Pa. 193,) and *Williams* v. *Thacker Coal & Coke Co.*, (44 W. Va. 599,) which cases dealt with statutes which, in their general purpose, were similar to the Illinois act. The Illinois court declined, however, to hold, as was done in the cases referred to, that where a statute directly

imposed duties upon a mine manager the negligence of such mine manager could not be imputed to the owner, and indeed that the owner could not be made responsible for the act of such employe without causing the statute to be unconstitutional. The Illinois court expressly held that under the Illinois mining act a mine manager and mine examiner were vice principals of the owner, and were engaged in the performance of duties which the owner could not delegate to others in such manner as to relieve himself from responsibility. Observing that in a number of its former decisions the Illinois court had assumed the law to mean what it expressly decided in the Henrietta case it did mean, viz., that in respect to the duties devolved upon the mine manager and mine examiner, those persons stood for the mine owner and and were vice principals, performing those duties. The court said:

"The fact that the proprietor, if he employs men to act in these capacities, is required to employ those who have obtained the certificate from the State mining board is without significance. The purpose of that provision was, so far as possible, to guard against the possibility of the proprietor employing incompetent, intemperate, negligent or disreputable persons, and not to enable the operator to shift to his employes his responsibility for the management of the mine.

"The object of the mining act, as we gather from its various provisions, is to protect, so far as legislative enactment may, the health and persons of men employed in the mines of the State while they are in the mines. The principal measures prescribed for this purpose require the exercise of greater precaution and care on the part of the mine owner for the safety of the miners than was required by the common law. To hold that he may shift his liability to any person employed by him as examiner or manager who holds the certificate of the State mining board is to lessen his responsibilities and defeat, in great part, the beneficent purposes of the act. To hold him liable for a willful violation of the act, or a willful failure to comply with its provisions on the part of his examiner or manager, is to give force and effect to the statute according to the intent of its makers to prolong the lives and promote the safety and well-being of the miners."

Accepting this interpretation of the Illinois statute, and in view of the ruling in *Consolidated Coal Co.* v. *Seniger*, (179 Ill. 370, 374, 375,) that it is not obligatory upon a mine owner to select a particular individual or to retain one when selected if found incompetent, we think the act is not repugnant to the Fourteenth Amendment in any particular. In legal effect, duties are imposed upon the mine owner, customarily performed for him by certain employes, duties which substantially relate to the furnishing of a reasonably safe place for the workmen. The subject was one peculiarly within the police power of the State, and the enactment of the regulations counted upon we think was an appropriate exercise of such power. The use and enjoyment of mining property being subject to the

reasonable exercise of the police power of the State, certainly the rights, privileges and immunities of a mine owner as a citizen of the United States were not invaded by the regulations in question, and the imposition of liability upon the owner for the violation of such regulations being an appropriate exercise of the police power, was not wanting in due process. And even although the liability imposed upon the mine owner to respond in damages for the willful failure of the mine manager and mine examiner to comply with the requirements of the statute was not in harmony with the principles of the common law applicable to the relation of master and servant, it being competent for the State to change and modify those principles in accord with its conceptions of public policy, we cannot infer that the selection of mine owners as a class upon which to impose the liability in question was purely arbitrary and without reason. And the views just expressed also adequately dispose of the contention that by the statute the mine owner was denied the equal protection of the laws.

The asserted error next to be considered relates to instructions to the jury on the subject of the proximate cause of the accident in the event Fulton went into the west roadway by direction of the mine manager. In the course of the charge to the jury the court said:

"If you believe from the evidence that Wilson, the mine manager, directed Fulton to go into the west roadway, and that said Fulton did so in obedience to such order, and such order was the proximate cause of Fulton's death, without the giving of which Fulton would not have been killed, then the jury is instructed that the plaintiff cannot recover in this case, and the verdict should be for the defendant. You will note there that it follows, if you believe that this instruction, if there was one, to Fulton was the proximate cause of his death, note that in passing upon that question you must determine whether, first, if there was gas there at that time; and whether, if there was, that was or was not the proximate cause of his death. Now by proximate cause is meant efficient cause. In other words, if the gas had not been there, would his death have followed? And was gas being there necessary to his death? Or was the instruction, if there was one, there willfully sending him there, the thing which caused his death; which was the greater cause? That is a question of fact for you to determine.

* * * * * *

"I said it was for them to determine what was the proximate cause if there was an order for this deceased to go into the mine, or whether it was the gas being there. Let the instruction be what I stated now, the last time; that covers it."

It is contended that the effect of the definitions of proximate cause, made as above, was to hopelessly confuse the jury. While it must be conceded that the instruction was greatly wanting in clearness, yet we think no prejudicial error was committed. Looking at the criticized instructions in connection with the context of the charge, it is clear that it was understood

by all as importing that the mining company was at fault for the existence of the accumulated gas resulting in the explosion which caused the death of Fulton, since to have allowed the gas to accumulate was a disregard of the positive duty towards Fulton imposed by the statute. Now, conceding that the mine manager ordered Fulton into the west roadway, and conceding, further, that such order of the manager was one of the causes of the accident, for which no recovery could be had because not counted on the declaration, what follows? Simply this, that two concurring causes contributed to the death of Fulton—one the order of the mine manager, for which recovery could not be had under the declaration, and the other the neglect by the mine owner to perform his statutory duty to prevent the accumulation of the dangerous gases which led to the accident. But because one of the efficient causes, the order of the mine manager, under the pleadings, did not give rise to a right of recovery, it did not follow that therefore the owner was absolved from responsibility for the cause of the accident for which he was liable. (*Washington & G. R. Co.* v. *Hickey*, 166 U. S. 521.)

We next consider two contentions: *a.* That the trial court erred in refusing to instruct the jury to return a verdict for the defendant if they found that Fulton, at the time he was killed, was engaged in a violation of the statute, which contributed to his death; that is, the doing of a willful act which endangered his life and the lives or health of persons working in the mine with him, and which jeopardized the security of the mine or its machinery; and, *b.* That the court also erred in refusing to instruct that if the death of Fulton resulted in part from his reckless disregard of consequences in view of his known surroundings, the plaintiff could not recover.

Leaving out of view the contention that the first requested instruction was rightly refused because too general, and bearing in mind that in an action to recover damages under the Illinois mining act a mine owner is deprived of the defense of contributory negligence, (*Carterville Coal Company* v. *Abbott*, 181 Ill. 495, 502, 503,) and assuming that the refused instruction might properly have been given if the tendency of the proof justified it, we think the instruction was rightly refused, because we are of opinion that there was no evidence tending to show the doing by Fulton of a willful act of the character contemplated by the statute or a reckless disregard by him of his personal safety. While the evidence might have justified the inference that Fulton before entering the west roadway knew that it had not been cleared of gas, yet it cannot be inferred that Fulton and his helper suspected that gas had so permeated the roadway as to render it perilous to life to go to the point where the explosion occurred. The jury had been instructed that there could be no recovery if the proof

established the contention of the mining company that Fulton entered the part of the mine in which he was killed against or contrary to caution given him by the mine manager, and if Fulton was permitted to enter the west roadway without caution it is impossible on this record to infer that the jury would have been justified in finding that it was obvious that to enter the west roadway was so hazardous as to give support to the conclusion that Fulton willfully and recklessly went to his destruction.

It is asserted that the court erred in refusing to give the following instructions:

"If you believe from the evidence that the decedent Fulton, just before the time of his death, entered the mine to work therein under the direction of the mine manager, Wilson, then you are directed to find the defendant 'not guilty,' even though you may further believe from the evidence that all the conditions of the mine had not been made safe at such time, as charged in the declaration."

The requested charge was based upon the last paragraph of that portion of section 18 (*b*) of the Illinois mining act, dealing with the duties of mine examiners, reading as follows:

"To post danger notices. (*b*) When working places are discovered in which accumulations of gas, or recent falls, or any dangerous conditions exist, he shall place a conspicuous mark thereat as notice to all men to keep out, and at once report his finding to the mine manager.

"No one shall be allowed to remain in any part of the mine through which gas is being carried into the ventilating current, nor to enter the mine to work therein, except under the direction of the mine manager, until all conditions shall have been made safe."

We construe this provision of the statute as relating to steps to be taken when a mine or a portion thereof is discovered to be unsafe and as relating to the necessary work to be done in the mine under the immediate supervision and direction of the mine manager to remedy the unsafe condition. As, however, there is no proof tending to show that Fulton in entering and working in the mine came under any of these conditions, we think the instruction was rightly refused.

The remaining assignments assert the commission of error by the trial court in overruling motions to strike out the second, third and sixth counts of the declaration and in refusing to instruct the jury that no recovery could be had under any of those counts, because no evidence had been introduced tending to establish the commission of the particular acts of negligence charged in those counts. Such counts as we have seen related to the failure to construct cross cuts and stoppings in the mine and to an alleged defect resulting from the absence of a wheel and the consequent necessity of using a wrench for the purpose of opening a valve to allow condensed steam to escape as a prerequisite to the movement of the ven-

tilating fan. We are constrained to the conclusion that prejudicial error was committed in these particulars. We think it is extremely doubtful whether there was any evidence in the record even tending to establish that in a long wall mine of the character of the one here in question cross cuts and stoppings thereof were essential. But be this as it may, certain is it that there is no evidence whatever in the record tending to support the claim that the absence of cross cuts and stoppings in the mine in question was in any wise the cause of the accumulations of gas or the retention of the accumulated gas from the explosion of which Fulton was killed. We are also of opinion that there was nothing in the evidence which would have justified the inference that the absence of the wheel from the valve, forming part of the mechanism to operate the ventilating fan, was the proximate cause of the presence of the gas in the west roadway where Fulton was killed. The uncontradicted testimony showed that but a very brief interval, a minute or two, elapsed before a wrench was obtained, and the distance to the point where the gas had accumulated precludes the possibility of saying that the evidence tended to show that the absence of the wheel could have been the proximate cause of the accident. Under this condition of things we find it impossible to say that prejudicial error did not result. (*Maryland* v. *Baldwin*, 112 U. S. 490, 493.) And, of course, in a case like the one we are considering we cannot maintain the verdict, as might be done in a criminal case upon a general verdict of guilty upon all the counts of an indictment. (*Goode* v. *United States*, 159 U. S. 663.) Nor does section 57 of the Illinois Practice Act, chap. 110, Rev. Stat. Illinois, support the contention that errors of the character of those we have just been considering must be treated as not prejudicial. The section relied upon is as follows:

"When an entire verdict is given on several counts it will not be set aside or reversed because of any defective count, if one or more of the counts be sufficient to sustain the verdict."

This section has been held not to relate to counts which are vitally defective, but as only providing that where a declaration consists of several counts, and some of the counts contain defects not vital and yet subject to be assailed by demurrer, a party cannot wait until after the close of the evidence at the trial and, *a fortiori*, after verdict, and then for the first time question the sufficiency of the counts. (*City of Chicago* v. *Lonergan*, 196 Ill. 518; *Consolidated Coal Co.* v. *Scheiber*, 167 Ill. 539.) This statute of course lends no support to the contention here made that where a jury is wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by any evidence, and where it is impossible from the record

to say upon which of the counts of the declaration the verdict was based, that the judgment entered under such circumstances can be sustained upon the theory that substantial rights of the objecting party had not been invaded.

The judgment of the Circuit Court is therefore reversed, and the case remanded to that court for further proceedings consistent with this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.